OCTOBER TERM, 1969

Supreme Court of the United States

LOUIS S. NELSON, WARDEN, PETITIONER

v.

JOHN EDWARD GEORGE, RESPONDENT

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

INDEX

United States Court of Appeals
for the Ninth Circuit

No. 22,851

John Edward George,
Appellant,

vs.

Louis S. Nelson, Warden, California State Prison, and Warden of North Carolina State Prison,
Appellees.

RELEVANT DOCKET ENTRIES

May 10, 1968—Record filed.

May 21, 1968—Supplemental Record filed.

June 13, 1968—Motion to Remand to District Court filed by appellant.

July 1, 1968—Opposition to "Motion to Remand to District Court" and motion to dismiss appeal filed by appellee Neson.

July 12, 1968—Order to pass matter to hearing on merits filed; appellant's Motion to Remand to be treated as opening brief; Appellee to file any reply within 30 days.

July 22, 1968—Closing brief for appellant and/or Opposition to "Motion to Dismiss Appeal" filed.

September 6, 1968—Anwering Brief filed by Appellee Nelson.

February 3, 1969—Motion for appointment as counsel of record, for appearance of counsel at oral argument and for leave to file supplemental brief is filed.

February 7, 1969—Order filed granting Motion to Appoint Counsel, for appearance of counsel at oral argument and to file supplemental Brief.

February 10, 1969—Petitioner—Appellant's reply brief filed.

February 28, 1969—Oral argument heard and Order of Submission filed.

May 9, 1969—Opinion filed and Judgment entered reversing and remanding proceedings.

May 23, 1969—Appellee's Petition for Rehearing and Suggestion for Rehearing En Banc filed.

June 11, 1969—Order Granting Appointment of Additional Counsel, George A. Cumming, Jr. filed.

June 18, 1969—Order Denying Petition for Rehearing filed.

United States District Court
Northern District of California

No. 48344

John Edward George,
Petitioner,
vs.
L. S. Nelson, Warden, San Quentin Prison,
Respondent.

RELEVANT DOCKET ENTRIES

December 7, 1967—Petition for writ of habeas corpus filed.

January 10, 1968—Order denying petition for writ of habeas corpus with leave to amend by naming the proper party respondent.

February 26, 1968—Amended Petition for writ of habeas corpus filed.

March 1, 1968—Order denying petition for writ of habeas corpus filed.

March 15, 1968—Petition for rehearing filed by petitioner.

March 21, 1968—Order denying petition for rehearing filed.

April 3, 1968—Application for certificate of probable cause filed.

April 25, 1968—Order granting petitioner's motion for certificate of probable cause and permiting petitioner to proceed *in forma pauperis.*

May 20, 1968—Notice of appeal filed.

In the United States District Court

Northern District of California

No. 48344

John Edward George, *Petitioner,*

vs.

State of North Carolina, *Respondent.*

ORDER

Petitioner, an inmate at San Quentin Prison, has filed this petition for writ of habeas corpus attacking his conviction by the State of North Carolina.

From the face of the petition it is apparent that the petitioner has failed to name the proper party respondent as required by 28 U.S.C. § 2242, for the person in whose custody he is confined is not designated. See *Mihailoviki v. State of California,* 364 F.2d 808 (9th Cir. 1966); *Morehead v. State of California,* 339 F.2d 170 (9th Cir. 1964).

Accordingly, this petition for writ of habeas corpus is DENIED, with leave to amend by naming the proper party respondent.

Dated: January 10, 1968.

/s/ Geo. B. Harris
United States
District Judge [CT 14]

United States District Court

Northern District of California

PETITION FOR WRIT OF HABEAS CORPUS
PERSONS IN STATE CUSTODY

Filed Feb 26 1968
James P. Welsh, Clerk

CASE NO. 48344

John Edward George (A-83856)
Full name and prison number (if any) of Petitioner

—VS—

L. S. Nelson, Warden, San Quentin State Prison (In the capacity as agent for State of North Carolina)
and
Warden, North Carolina State Prison
Name of Respondent (Name Unknown)

INSTRUCTIONS—READ CAREFULLY

In order for this petition to receive consideration by the District Court, it shall be in writing (legibly handwritten or typewritten), signed by the petitioner and verified (notarized), and it shall be set forth in concise form the answers to each applicable question. If necessary, petitioner may finish his answer to a particular question on the reverse side of the page or on an additional blank page. Petitioner shall make it clear to which question any such continued answer refers.

Since every petition for habeas corpus must be sworn to under oath any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Petitioners should therefore exercise care to assure that all answers are true and correct.

If the petition is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that petitioner will be unable to pay the fees and costs of the habeas corpus proceedings. When the petition is completed, the *original and one copy* shall be mailed to the Clerk of the District Court for the Northern District of California, San Francisco, California.

[CT 15]

1. Place of detention: San Quentin State Prison
2. Name and location of Court which imposed sentence: Gaston County Superior Court, Gastonia, North Carolina
3. The indictment number or numbers (if known) upon which, and, the offense or offenses for which sentence was imposed:
   (a) 47614
   (b)
   (c)
4. The date upon which sentence was imposed and the terms of the sentence:
   (a) February 9, 1967 (12 to 15 years in North Carolina State Prison)
   (b)
   (c)
5. Check whether a finding of guilty was made:
   (a) after a plea of not guilty: XX
   (b) after a plea of nolo contendre:
   (c) after a plea of guilty:

6. If you were found guilty after a plea of not guilty, check whether that finding was made by:
   (a) a jury: XX
   (b) a judge without a jury:
7. Did you appeal from the judgment of conviction or the imposition of sentence? Yes
8. If you answered "yes" to (7), list:
   (a) The name of each court to which you appealed:
      I Supreme Court of North Carolina
      II
      III [CT 16]
   (b) The result in each such court to which you appealed:
      I Judgment affirmed
      II
      III
   (c) The date of each such result:
      I September 27, 1967
      II
      III
   (d) If known, citations of any written opinion or orders entered pursuant to such results:
      I State v. George, #168 (156 S.E. 2d 845)
      II
      III
9. If you answered "no" to (7), state your reasons for not so appealing:
   (a)
   (b)
   (c)
10. State concisely the grounds on which you base your allegations that you are being held in custody unlawfully:

(a) Petitioner was released on July 11, 1966, from California custody to North Carolina authorities by mutual agreement (See 1389 Cal. Penal Code & (N.C.) G.S. 148-89) to stand trial for an alleged violation of North Carolina law. It is the North Carolina Supreme Court decision that is under attack here. North Carolina statute G.S. 148-89 and California Penal Code, Section 1389, Article III (a) says, in effect, that a person imprisoned in a party state (California and North Carolina are party states under this agreement) who has an untried indictment and for which a detainer has been lodged, **[CT 17]** *shall* be brought to trial within 180 days after written notice is received by the prosecuting officer of the jurisdiction lodging said detainer from the prisoner requesting final disposition of the indictment, unless for good cause the court may grant reasonable continuance. Petitioner's first trial ended in a mistrial on August 15, 1966. He was not brought to trial again until February 8, 1967, a period of 176 days from his first trial, 207 days from his arrival in North Carolina and 238 days from the time written notice was received by the North Carolina authorities.

(b) Petitioner was turned over to North Carolina pursuant to California Penal Code Section 1389 which provides a prisoner shall be tried within 120 days after his arrival in the demanding state (North Carolina). This statute was ignored by the prosecution thereby depriving petitioner his right to a speedy trial as guaranteed by statute and the United States Constitution.

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) Petitioner was scheduled for retrial on October 3, 1966, in Mecklenburg County. Because of adverse newspaper publicity of the first trial, petitioner moved for a change of venue which was granted. The second trial was to take place in Gaston County. Upon the granting of this motion (motion for retrial), for some still unexplained reason, petitioner was surrendered to the authorities of New Hanover County where he remained for some two (2) months without making a court appearance. In December, 1966 he was returned to Gaston County, but was told the courts recess for two (2) weeks during December, therefore his trial would have to commence after the holidays. In January he was told because of the courts recent recess he would be unable to immediately stand trial because of "congested calendar" occasioned by the December backlog of cases. On February 8, 1967, petitioner was finally taken to trial in Gaston County, over four (4) months after his scheduled retrial of October 3, 1966.

It should be noted that at this second trial, the prosecution presented two more witnesses than at the first trial—neither of these witnesses had petitioner seen before. It was because of these two "witnesses" testimony that has resulted in an innocent man being convicted of a crime he did not commit. Petitioner contends this unwarranted removal to New Hanover County was a prosecution scheme or plan to bolster a weak case with perjured testimony and the North Carolina Supreme Court has evaded and side stepped the issue by the ambiguous language in their opinion in *State v. George,* 156 S.E. 2d 845.

(b) In the opinion of *State v. George,* supra, the North Carolina court has asserted that petitioner was returned to North Carolina at his "own request", implying ~~that~~ this "request" **[CT 18]** nullifies the 120 day limit in which he legally must be brought to trial after arrival in North Carolina. This theory is not strictly true. A detainer was lodged with the California authorities by the North Carolina authorities stating he was "wanted" by the prosecuting attorney in North Carolina—not the reverse as the court seems to imply.

Petitioner knew that he had committed no crime in North Carolina. He wanted the detainer withdrawn so he could more favorably receive parole consideration from California and also enjoy the benefits of a reduced custodial status classification. Such classification is impossible to acquire with an unexecuted warrant lodged against a prisoner. In essence, petitioners initation of having the detainer executed was a *demand for trial.* Certainly petitioner was returned to North Carolina at the "request" of the prosecutor. Petitioner's written notice to attempt to clear up the detainer was mearly the catalyst to the North Carolina officials. There is no logical or reasonable manner in which it could be argued that this petitioner was tried in North Carolina at his "own request". However, even if this court does interpret this trial was at petitioner's "own request" as the North Carolina court ruled, it still does not change the wording of the statute. The North Carolina court is putting their own conditions on a statute that the legislature did not include. This court may take judicial notice that the North Carolina Supreme Court is not em-

powered with legislative functions or authority. They may interpret the law in their own manner, but they cannot change it as they have attempted to do in the instant case.

Petitioner contends both G.S. 148-89, Article III (a)—trial within 180 days after written notice received—and Article IV—trial within 120 days after arrival in North Carolina—apply here and the provisions contained therein have not been adhered to by the North Carolina authorities. **[CT 19]**

12. Prior to the petition have you filed with respect to this conviction:
   (a) Any petition in a State Court for relief from this conviction? Direct appeal to Supreme Court of North Carolina.
   (b) Any petitions in State or Federal Courts for habeas corpus? Yes—Previous petition filed in this court (#48344). Petition was denied with leave to amend—this is the amended petition. Order by Judge Harris 1/12/68.
   (c) Any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No
   (d) Any other petitions, motions, or applications in this or any other court? Only as specified in (a) above.
13. If you answered "yes" to any part of (12), list with respect to each petition, motion, or application:
   (a) The specific nature thereof:
      I Direct appeal from judgment to Supreme Court, No. Carolina.
      II
      III
      IV

(b) The name and location of the court in which each was filed:

I. Supreme Court, North Carolina, 27th District

II

III

IV

(c) The disposition thereof:

I Judgment affirmed [CT 20]

II

III

IV

(d) The date of each such disposition:

I September 27, 1967

II

III

IV

(e) If known, citations of any written opinions or orders entered pursuant to each such disposition;

I *State v George,* 156 S.E. 2d 845

II

III

IV

14. Has any ground set forth in (10) been previously presented to this or any other court, State or Federal, in any petition, motion, or application which you have filed? Yes

15. If you answered "yes" to (14), identify:

(a) Which grounds have been previously presented?

I Violation of statutory guarantee to speedy trial as defined in G.S. 148-89, 1389 California Penal Code and Sixth Amendment to the United States Constitution.

II

III

IV [CT 21]

(b) The procedings in which each group was raised?

I On direct appeal

II

III

IV

16. If any ground set forth in said (10) has not previously been presented to any court, State or Federal, set forth the ground and state concisely the reasons why such ground has not been previously presented;

(a)

(b)

(c) [CT 22]

17. Were you represented by an attorney at any time during the course of:

(a) Your Arraignment and Plea? Yes

(b) Your Trial, if any? Yes

(c) Your Sentencing? Yes

(d) Your Appeal, if any, from the judgment of conviction of the imposition of sentence? Yes

(e) Preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? Yes

18. If you answered "yes to one or more of (17), list:

(a) The name and address of each attorney who represented you:

I T. O. Stennett, Attorney At Law (At all proceedings)

II Suite 520, Wilder Building
Charlotte, North Carolina

III

(b) The proceedings at which such attorney represented you:

I Arraignment and plea

II Trial and sentencing

III Appeal

19. If you are seeking leave to proceed in *forma pauperis*, have you completed the sworn affidavit setting forth the required information (see, Instructions, page 1, of this form)?

N/A

State of California } ss: Verification
County of Marin }

I, John Edward George, being first sworn under oath, presents that he has subscribed to the above and does state that the information therein is true and correct to the best of his knowledge and belief.

Dated: February 14, 1968

Respectfully submitted,

By: /s/ JOHN EDWARD GEORGE
Signature of Petitioner **[CT 23]**

MEMORANDUM OF POINTS AND AUTHORITIES AND ARGUMENT IN SUPPORT OF PETITION

Jurisdiction of this court is invoked under 28 USCA 2254 after petitioner has sought relief in the Supreme Court of North Carolina in an action entitled *State v. George*, 156 S.E. 2d 845. As this was a direct appeal to the state's highest court, there is no statutory provisions for petitioner to seek further relief in a state proceeding. Hence, since petitioner

has exhausted his state remedies, this court has jurisdiction to issue an order to Show Cause why the writ of habeas corpus should not issue as prayed under *Fay v. Noia,* 83 S. Ct. (1963), as petitioner has litigated his federal claim in the state courts at least once, persuant to available state remedies before being eligible to apply for the writ in a federal district court. (See *Fay v. Noia,* Supra)

This was a criminal action tried at the Regular Session of the January 30, 1967, Criminal Term of the Superior Court of Gaston County, before his Honor W. K. McLean, Judge Presiding and a jury. Said criminal case having been transferred for trial from Mecklenburg County to Gaston County under "Order For A Change Of Venue," dated October 4, 1966.

The petitioner was serving a sentence in the California State Prison. The bill of indictment # 47-614 was procured by the State of North Carolina, Mecklenburg County, charging the petitioner with Armed Robbery, and as a result of said bill a detainer was lodged against petitioner with the State of California. **[CT 24]** Petitioner was notified by the California Prison Authority that he would be eligible for parole in October, 1966, if said detainer was cleared. Petitioner made request to the proper authorities on June 15, 1966 that he be returned to North Carolina for trial. That under the Interstate Agreement on detainers he was returned to North Carolina, arriving in the State of North Carolina on the 11th day of July, 1966; petitioner was put to trial on the 15th day of August, 1966, with said trial resulting in a mistrial. Petitioner was again put to trial over his protest on February 7, 1967.

Before entering a plea, petitioner moved the court to declare the indictment null and void and of no effect, on the grounds that he had not been brought to trial in the statu-

tory time limit; and petitioner also moved the court to stay the trial for the lack of jurisdiction. On the denial of these motions the petitioner, upon being placed on trial for Armed Robbery (211 PC), entered a plea of Not Guilty, and from a verdict of guilty and a judgment pronounced thereon, the petitioner appealed to the North Carolina Supreme Court. Said appeal was affirmed by the North Carolina Supreme Court and petitioner hereby petitions the Federal Court on the questions that the North Carolina State Court dismissed.

Petitioner's motion moving the court for an order declaring the bill of indictment void and no further force and effect should have been allowed on the grounds that petitioner was not brought to trial within the statutory time. Also, petitioner's motion as to the lack of jurisdiction of the court to try the case should have been allowed.

The question raised by petitioner's first motion is based on **[CT 25]** the time element, wherein petitioner contends the state failed to comply with the statutory requirements set out under GS 148-89, Article III(a); and GS 148-89, Article IV(c).

The question raised by petitioner's second motion is the Court's lack of jurisdiction, GS 148-89, Article III(d) and GS 148-89, Article IV(c).

General Statutes 148-89(a), to wit:

"prisoner shall be brought to trial within One Hundred Eighty (180) Days after he shall have cause to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment; provided that for good cause shown in open court the prisoner and his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance."

General Statutes 148-89, Article IV(c), to wit:

"In respect of any proceedings made possible by this article, Trial Shall be Commenced Within One Hundred Twenty (120) Days of the arrival of the prisoner in the receiving state, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance."

Addressing petitioner's remarks to the question raised in the first motion, petitioner contends that he complied with the statutory requirements in that:

(a) "Letter dated June 15, 1966 from John Edward George to the Hon. Edward Brown, Governor of California, marked defendant's Exhibit # 4 for identification" is evidence of defendant's (petitioner's) compliance with portion of GS 148-49, Article III(b); **[CT 26]** requiring notice to be returned to the State of North Carolina to stand trial on indictment which a detainer had been lodged against petitioner;

(b) the record reveals that petitioner had entered upon an indeterminate term of from five (5) years to life in a penal institution, to wit: California State Prison at San Quentin; that said sentence had been running from April 28, 1964; parole eligibility October, 1966.

As per notice of June 15, 1966, petitioner was brought into the State of North Carolina on July 16th, 1966, and put to trial in Mecklenburg County on August 15th, 1966, said trial resulting in a mistrial. Again on October 3, 1966, the State commenced the second trial, at which time the petitioner made a motion for a change of venue, which motion was ordered by Order dated October 4, 1966, transferring said cause to the Superior Court of Gaston County for trial. When petitioner was finally brought to trial in Gaston County on February 8, 1967, after having been routed via

New Hanover County for a period of several months, petitioner made a motion asking the court to declare the indictment null and void, and of no further effect, and to dismiss the same, said motion was denied. Petitioner was put to trial on February 8, 1967. When petitioner was called to trial a motion was lodged with the Court attacking the jurisdiction of the Court.

Petitioner submits that between August 15th, 1966 until October 3rd, 1966, there was a time lapse of Forty-Eight Days he was required to remain in jail without just cause, and the State made no effort to bring petitioner to trial during the several criminal terms between these dates, and there was no **[CT 27]** reason for not bringing petitioner to trial except the negligence on the part of the State, as petitioner was at all times ready for trial.

Petitioner contends and so submits that his Constitutional right as to a speedy trial was violated; Constitution of the United States, Article VII, Amend. VI.

Petitioner submits that when he was called to trial on *October 3, 1966* and motion for change of venue granted, he was spirited away on *October 4, 1966;* having been transported to Wilmington, North Carolina, under a writ of Habeas Corpus ad Prosequendum, issued on the 4th day of October, 1966, by the Honorable Henry L. Stevens Jr., Superior Court Judge of North Carolina, at the request of the prosecuting attorney of Mecklenburg County. That petitioner was lodged in the New Hanover County Jail, Wilmington, North Carolina, on the 4th day of October, 1966, and remained in said jail until December 7, 1966, when a motion was made on behalf of petitioner by petitioner's attorney to be returned for trial in Gaston County, and the motion granted by the Honorable George M. Fountain, Judge of the Superior Court of North Carolina.

The time that expired between October 4th, 1966, and December 7, 1966 was a sum total of Sixty-Five (65) days. As there had been no detainer lodged against petitioner, or any untried indictments, information or complaint pending in New Hanover County, therefore, State was not in compliance with GS 148-89, Article IV(a) to wit:

"The appropriate officer of the jurisdiction in which an untried indictment, information or complaint is pending shall be **[CT 28]** entitled to have a prisoner Against Whom He Has Lodged a Detainer and who is serving a term of imprisonment in any party state made available in accordance with GS 148-89, Article V(a)."

This delay of Sixty-Five Days was caused by the state's error and cannot be contributed to any fault of petitioner as he was ready for trial on the indictment in Mecklenburg County, the indictment he agreed and requested to be returned to trial for. This was an action by the State over which petitioner had no control, and therefore would negative any argument by the State as to "good cause shown for necessary or reasonable continuance."

Petitioner submits that inasmuch as there was no detainer filed in the State of California by the State of North Carolina with respect to untried indictments in New Hanover County at the time petitioner agreed to return to North Carolina as required by North Carolina General Statutes, 148-89, the petitioner did not waive his right to extradition proceedings in the State of California with respect to any indictments, against him inNew Hanover County, North Carolina.

Petitioner contends that he was held illegally, and without due process of law in New Hanover County for a period of Sixty-Five (65) Days in violation of the Federal Constitution, and delayed unnecessarily the trial on the Mecklenburg

indictment, and was informed and believes that the state of North Carolina through its solicitor and others, planned to keep petitioner confined, imprisoned and restrained in New Hanover County Jail until such time as he would make a confession or agree to be put to trial in New Hanover County, and that the only thing that prevented the State from so doing was a motion on behalf of petitioner by his attorney, and granted by the Honorable George M. Fountain, Judge of the Superior Court of North Carolina, for his release or transfer back for trial in Mecklenburg County, all of which petitioner contends shows bad faith. Petitioner further contends the transfer of his person from Mecklenburg County to the County Jail in New Hanover County was for the purpose of forcing him to stand trial on the subject charges and was [CT 29] in derogation of the Interstate Contract and Agreement on Detainers to which the state of North Carolina was a party and in direct violation of Article 10, Chapter 148 of North Carolina General Statutes, entitled "Interstate Agreement on Detainers". Therefore petitioner contends that the State has no right to evade the responsibility of the unnecessary and unreasonable delay caused by their sole actions, and that such unjust delay caused petitioner to be confined in jail without affording him the trial he came to North Carolina to have. That such action was very prejudicial to the petitioner and should be awarded for the unjust treatment at the hands of the State by having the indictment dismissed in accord with their own State Statute, GS 148-89.

From October 3rd, 1966 when petitioner was called to trial until February 8th, 1967 when petitioner was finally put to trial a sum total of One Hundred Twenty Eight (128) Days expired. So petitioner contends that if the State should try to contend for "good cause shown" on account of

petitioner's motion for a change of venue, that this argument would be negative by the elapse of One Hundred and Twenty Eight (128) Days, far more than the requirements.

Petitioner contends that the continuance of February 3rd, 1967 by trial court should not be allowed to stand in view of the negligence of the State as shown in the hereinabove state of facts, and the petitioner should not have been put to trial after the statutory time had been allowed to run. **[CT 30]**

Petitioner contends that the time governing the statutory time should be computed from June 15th, 1966 the time he made request to be brought back for trial, until he was put to trial on February 8th, 1967, a sum total of Two Hundred and Thirty Nine (239) Days, far beyond the One Hundred and Eighty (180) Days. GS 148-89, Article III(a); or at least petitioner contends that the time should be computed from the time of his arrival in the State of North Carolina, on the 16th day of July, 1966 until he was put to trial on February 8th, 1967, a sum total of Two Hundred and Eight (208) Days, far beyond the statutory limits of One Hundred and Eighty (180) Days.

Petitioner further contends that at least the statutory time should be computed from the time of his request on October 3rd, 1966 for a change of venue until the time he was put to trial on February 8th, 1967, which would be a time total of One Hundred and Twenty Eight (128) Days, which would exceed the statutory time of One Hundred and Twenty (120) Days. GS 148-89, Article IV(c).

Petitioner contends the first motion should have been allowed as the statutory time had run against the state and in favor of the petitioner. GS 148-89, Article III(a), or that the second motion should have been allowed as the Court had no jurisdiction of the subject matter, the statutory time being the governing factor. **[CT 31]**

This case is similiar in many respects to *Klopfer v. State of North Carolina,* No. 100, October Term, 1966, decided March 13, 1967. In *Klopfer v. State of North Carolina,* Mr. Chief Justice Warren held North Carolina's statute procedural device known as the "nolle prosequi with leave" was in violation of the Federal Constitutional guarantee of the right to a speedy trial. *Klopfer* was before the High Court at approximately the same time petitioner was awaiting trial on the cause presented herein. It is petitioner's considered opinion that because of the impending decision due in *Klopfer,* the North Carolina Solicitor circumvented the "nolle prosequi" practice and arranged to have petitioner delivered to yet another jurisdiction—New Hanover County—pursuant to a writ of habeas corpus as prosequendum on an apparently non existent charge as your petitioner was never taken to court in New Hanover County. He merely sat in jail for some sixty five (65) days in a strange county for no reason—except to give the prosecutor the added time advantage to prepare a "new" case against the defendant. The prosecution knew petitioner was on loan from California and could not make bail. The extra delay caused by the North Carolina authorities provided an over zealous prosecutor the opportunity to produce two (2)—evidently professional—witnesses which by their completely false and perjurious testimony, unsupported by any documentary proof whatever, tipped the scales to the prosecution's advantage and resulted in the conviction complained of herein.

The tactics complained of in this petition, tactics by the North Carolina solicitor, have denied petitioner the Fourteenth Amendment's guarantee to due process of law and a speedy trial. (*Mally v. Hogan,* 378 U.S. @ 10; of: *Pointer v. Texas,* 380 U.S. 400 on illegal "mug shots" Identification)

The North Carolina Court has ignored their own legislation on this issue (G.S. 148-89, Article III(a), Article IV) and apparently shifting the responsibility to the more qualified Federal Court on this Federal issue. The decision was a **[CT 32]** close 4 to 3 majority in this case (*State v. George,* supra). Petitioner feels this court should order a hearing to determine the question presented by this application and respectfully requests the appointment of counsel under *Gideon v. Wainwright,* 372 U.S. 355, to adequately present his cause before this court.

This amended petition is submitted pursuant to the order by Chief Judge George B. Harris denying the previous application (# 48344) with leave to amend, presented in this matter by incorrectly naming the respondent.

Although this action concerns the State of North Carolina, the actual person having petitioner in custody is L.S. Nelson, Warden, San Quentin Prison, who is acting as agent for North Carolina in this instance.

Respectfully,

/s/ John Edward George
John Edward George
Petitioner

Dated: February 14, 1968 **[CT 33]**

In the United States District Court
Northern District of California

No. 48344

Filed Mar. 1, 1968
James P. Welsh, Clerk

John Edward George,
Petitioner,

vs.

L. S. Nelson, Warden, San Quentin Prison,
Respondent.

ORDER

By order of this Court dated January 10, 1968, petitioner's application for writ of habeas corpus was denied for failure to name the proper party respondent. This deficiency has now been corrected.

Petitioner, while imprisoned at San Quentin Prison pursuant to a valid California judgment, was transferred to North Carolina to stand trial on a charge of armed robbery. He was convicted and returned to San Quentin. He now seeks to attack his North Carolina conviction.

\lthough his petition does not so state, it is assumed that the petitioner is serving concurrent sentences on the California and North Carolina convictions. Thus, he would not be entitled to release from detention, even if his North Carolina conviction were held to be illegal. This **[CT 38]** is a fatal defect. *McNally v. Hill,* 293 U.S. 131.

Accordingly, this petition for writ of habeas corpus must be, and hereby is, DENIED.

DATED: March 1, 1968.

/s/ Geo. B. Harris
United States District Judge **[CT 39]**

John Edward George
Box A 83856
Tamal, California 94964

In pro se

In the United States District Court
for the Northern District of California

No. 48344

Filed Mar. 15, 1968
James P. Welsh, Clerk

John Edward George,
Petitioner,
vs.
L. S. Nelson, Warden, San Quentin Prison,
Respondent.

PETITION FOR REHEARING

To: The Honorable George B. Harris, Presiding

By an order of this court filed on March 1, 1968, and received by petitioner on March 7, 1968, it was declared petitioner's amended application for habeas corpus was denied.

The reason for said denial was this court's application of *McNally v. Hill,* 293 U.S. 131 to the case at bar.

Petitioner herein respectfully requests the court to reconsider the previously submitted petition in this matter and bases his request on the following issues:

In petitioner's previous petition, the manner of service of his North Carolina sentence was left unexplained. This was

because the sentencing court in North Carolina did not specify how its sentence should be served. The sentencing court imposed a twelve to fifteen year sentence. Actual service or commencement of this term will not start until petitioner is delivered to, and is in actual custody of the warden of the **[CT 40]** North Carolina Prison. Although it was not expressly so ordered, the effect of the North Carolina sentence is consecutive, not concurrent.

The court has denied issuance of this writ on the 1934 ruling of *McNally v. Hill,* supra, however, this was done on the obvious assumption that the North Carolina and California sentences were being served concurrently. Under the circumstances, petitioner respectfully suggests his cause does not fall under the strict rule of *McNally* but falls into the more realistic and contemporary ruling in *Arketa v. Wilson,* 373 F. 2d 582 (9th Cir. 1967). *Arketa* held that the writ could issue regardless of *McNally* if ". . . it appears that there are situations in which the writ can be used to free a petitioner *from a certain type of custody, rather from all custody.*" (Emphasis Added) cf. *Martin v. Virginia,* (1965) 349 F. 2d 781; *Smart v. Wilson,* #43221 U.S.D.C.—San Francisco.

Petitioner respectfully points out that the granting of this writ would free him from a particular type of custody—the unexecuted North Carolina warrant. This is a form of custody as it assuredly affects his custodial classification and probability of parole on his California sentence. A similar ruling on a specific type of custody was pronounced in *Jones v. Cunningham,* (1963) 371 U.S. 236, that dealt with a convict on parole. The Supreme Court held parole was a type of custody as it curtailed freedom of movement. As

applied here, the North Carolina detainer likewise reduces petitioner's freedom of movement and under *Jones* must be considered a certain type of custody. Petitioner is *not* contesting his conviction, per se, he is attacking his unlawful custody caused by the North Carolina detainer which has resulted from an unlawful conviction. Federal habeas corpus is to contest illegal custody, that is the issue petitioner is attempting to present before **[CT 41]** this court.

Petitioner is of the opinion his situation falls within the meaning of the *Arketa* ruling and rationale. Therefore, in light of the foregoing petitioner respectfully requests this court to reapprise its prior denial of the writ in this matter —this denial based entirely on *McNally v. Hill,* and most urgently moves this court to rule and base its decision in this matter on the merits of the case as set forth in detail in the prior application that this petition for a re-hearing is based upon.

Respectfully submitted,

/s/ John Edward George,
John Edward George
Petitioner

Dated: March 8, 1968 **[CT 42]**

In the United States District Court
Northern District of California

Filed Mar. 21, 1968.
James P. Welsh, Clerk

No. 48344

John Edward George, *Petitioner,*

vs.

L. S. Nelson, Warden, San Quentin Prison, *Respondent.*

ORDER

By order of this Court dated March 1, 1968, petitioner's application for writ of habeas corpus was denied. The Court, relying on *McNally v. Hill,* 239 U. S. 131, held that inquiry into the petitioner's North Carolina conviction was barred because he was concurrently serving a sentence pursuant to a valid California judgment.

Petitioner now seeks a rehearing. He argues that *McNally* is not applicable to his case because he will not begin serving his North Carolina sentence until completion of his California sentence. The *McNally* rule, however, is equally applicable to the situation where the sentence imposed pursuant to the conviction under attack is to be served after, rather than concurrently, with the valid sentence.

Accordingly, this motion for a rehearing must be, **[CT 43]** and hereby is, denied.

Dated: March 20, 1968.

/s/ Geo. B. Harris
United States District Judge **[CT 44]**

No. 22851

In the United States Court of Appeals
for the Ninth Circuit

John Edward George,
Petitioner and Appellant,
vs.
The State of North Carolina,
Respondent and Appellee.

EXHIBITS A THROUGH D ATTACHED TO OPPOSITION TO MOTION TO REMAND TO DISTRICT COURT AND MOTION TO DISMISS APPEAL FILED BY APPELLEE NELSON ON JULY 1, 1968

THE ANNEXED INSTRUMENT IS A CORRECT COPY OF THE ORIGINAL ON FILE IN MY OFFICE. ATTEST: CERTIFIED

APR 27 1964

MARTIN MONGAN, COUNTY CLERK OF SAN FRANCISCO, AND EX-OFFICIO CLERK OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO.

BY ..... DEPUTY

RECEIVED
CA_IF MEDICA.
FACILITY
APR 28 1 49 PM '64

FILED
APR 27 1964
MARTIN MONGAN, Clerk
By J. FITZPATRICK
Deputy Clerk

Six GUID62815CENTER

DEPT. No..... CASE No.....

In the Superior Court of the State of California

IN AND FOR THE City & COUNTY OF San Francisco

ABSTRACT OF JUDGMENT

(Commitment to State Prison as provided by Penal Code Section 1213.5)

The People of the State of California,

vs

JOHN EDWARD GEORGE

Defendant.

Hon. Francis McCarty (Judge of Superior Court)

John M. Dean (District Attorney)

Cyril L. Weeks (Counsel for Defendant)

This certifies that on the 27th day of April, 19 64 judgment of conviction of the above-named defendant was entered as follows:

In Case No. 62815 Count No. 2 he was convicted by Court (Court or Jury); on his plea of Guilty (guilty, not guilty, former conviction or acquital, once in jeopardy, not guilty by reason of insanity); of the crime of Robbery in the First Degree

(designation of crime and degree, if any, including the fact that it constitutes a second or subsequent conviction of same offense if that affects the sentence and if under Section 209 of the Penal Code whether victim suffered bodily harm)

in violation of 211 Penal Code (reference to Code or Statute, including Section and Sub-Section);

with prior convictions charged and proved or admitted as follows:

DATE	COUNTY AND STATE	CRIME	DISPOSITION

Defendant was (was) or (was not) charged and admitted the allegations of this count to have been armed with a deadly weapon at the time of commission of the offense, or a concealed deadly weapon at the time of his arrest within the meaning of Penal Code Sections 969c and 3024.

Ct. No. 3 Deadly Weapon cause dismissed

EXHIBIT A

30

Defendant was not (was) or (was not) adjudged a habitual criminal within the meaning of Sub-division ..... (a) or (b) of Section 644 of the Penal Code, and the defendant ..... (is) or (is not) a habitual criminal in accordance with Sub-division (c) of that Section.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the said defendant be punished by imprisonment in the State Prison of the State of California for the term provided by law, and that he be remanded to the Sheriff of the City & County of San Francisco and by him delivered to the Director of Corrections of the State of California at the place hereinafter designated.

It is ordered that sentences shall be served in respect to one another as follows: ..... (Note whether concurrent or consecutive as to each count)

and in respect to any prior incompleted sentence (s) as follows: ..... (NOTE whether concurrent or consecutive as to all incomplete sentences from other jurisdictions);

To the Sheriff of the City & County of San Francisco and to the Director of Corrections:

Pursuant to the aforesaid judgment, this is to command you, the said Sheriff, to deliver the above-named defendant into the custody of the Director of Corrections at Vacaville, California at your earliest convenience.

Witness my hand and seal of said court

this 27th day of April 27, 1964

MARTIN MONGAN ..... Clerk

by ..... Deputy

SEAL

State of California,

City & County of San Francisco

I do hereby certify the foregoing to be a true and correct abstract of the judgment duly made and entered on the minutes of the Superior Court in the above entitled action as provided by Penal Code Section 1213.

attest my hand and seal of the said Superior Court this 27th day of April 19 64

MARTIN MONGAN, by J. FITZPATRICK Deputy

County Clerk and Ex-Officio Clerk of the Superior Court of California in and for the City & County of San Francisco

The Honorable: Francis McCarty

Judge of the Superior Court of the State of California, in and for the City & County of San Francisco

NOTE: If probation was granted in any sentence of which abstract of judgment is certified, attach a minute order reciting the fact and imposing sentence or ordering a suspended sentence into effect.

Entered in Min. Dept. 6, Sup. Ct., vol. 208

	Credits Forfeited	Restored Credits	Additional Credits	Discharge Date	Effective Parole Date
CRIME: Robb 1st (211) PC					
TERM: 5-Life					
COUNTY: SAN FRANCISCO					
County Case No.: 62815 PG					
JUDGE: F. MC CARTY					
4-28-64 REC'D @ RGC CMF					
6-4-64 Wanted-Marshal, Sedgwick Co., Wichita, Kansas (Armed Robb) #64 CR 49					
6-10-64 Wanted Washoe Co. D.D. Nevada Warr# 63-163					
6-11-64 Wanted Charlotte P.D. No. Carolina Warr# 40992					
7-23-64 Rec'd CR					
10-14-65 Denied. Placed on NR Calendar -					
7-20-66 Released to Custody, State of North Carolina (Under the Provision of the Interstate Agreement on Detainers.)					
10-25-66 LP until return from North Carolina.					
3-12-67 Rec'd S.J. T.T. (fr. No Carolina)					
4-21-67 Wanted-State of No. Carolina					
7-20-66 No longer Wanted (North Carolina - Police Dept. (Charlotte)					
4-26-67 Denied. LP on NR Cal.					
4-25-68 Denied. LP on NM Cal.					

A-83856 GEORGE, JOHN EDWARD
Summary of Sentence Data

CDC-118 (23883)

EXHIBIT B

Wanted

Exhibit C

State of North Carolina
Prison Department [Letterhead]
Raleigh 27603

January 31, 1967

Warden Lawrence E. Wilson
California State Prison
San Quentin, California 94964

Attention: W. C. Schiller

Re: George, John E.
A-83856

Dear Mr. Schiller:

In reply to your letter of January 20, 1967, about subject, I find the following:

When he was tried in Wilmington, North Carolina, (New Hanover County), the judge allowed his motion not to be tried because the detainer had not been filed prior to his being brought to this State. He was then turned back to the Mecklenburg County authorities. He objected to trial there because of the publicity at the first trial which ended in a mistrial. He was then sent to Gaston County for a change of venue. He will be tried during the week of February 6, 1967, and should be on his way to California shortly thereafter. If he is not returned by March 1, 1967, please let me know.

Sincerely,

/s/ Martin R. Peterson
Martin R. Peterson
Prisoner Rehabilitation Director

MRP/jg

Exhibit D

GASTON COUNTY [Letterhead]
Office of
Clerk of the Superior Court
Gastonia, North Carolina
April 14, 1967

Mr. W. C. Schiller, Records Officer
California State Prison
San Quentin, California

Dear Mr. Schiller:

Transmitted herewith is a certified copy of the Judgment of the Superior Court of Gaston County, North Carolina, rendered in the case of State vs John Edward George, also known as Johnny George, your number A-83856.

We are advised that this man is serving a sentence of imprisonment at California State Prison.

This is, therefore, to advise you that he is wanted at the termination of his imprisonment there for return to this jurisdiction to serve the sentence imposed in the Superior Court of Gaston County, North Carolina.

I ask that you acknowledge receipt of this letter and that you inform me if other or further records or documentation is required.

We desire to be notified in advance of any release date in the future in order that custody can be assumed by North Carolina authorities.

Very truly yours,

/s/ GEORGE C. HOLLAND
George C. Holland
Clerk of Superior Court

State of North Carolina

County of Gaston

In the Superior Court, January 30, 1967
Criminal Session

State

vs.

John Edward George

Charge: Armed Robbery.
Plea: Not Guilty.
Jury Verdict: Guilty as charged in the Bill of Indictment.

JUDGMENT

It is the judgment of the Court that the defendant be confined in the State's Prison, there to be assigned to labor under the supervision of the State Prison Department for a period of not less than twelve (12) nor more than fifteen (15) years.

It is recommended that the cases pending in New Hanover County be dismissed.

W. K. McLean
Judge Presiding

NORTH CAROLINA, GASTON COUNTY.

CERTIFICATE

I hereby certify the foregoing and/or annexed to be a true and correct copy of the original document indicated as appears from the caption thereof, as the same is taken from and compared with the said original document now on file and as appears of record in the office of the Clerk of Superior Court of Gaston County at Gastonia, North Carolina.

Witness my hand and official seal, this the 14th day of April, 1967.

/s/ George C. Holland
GEORGE C. HOLLAND
Clerk of Superior Court, Gaston County, North Carolina

No. 22851

In the United States Court of Appeals

For the Ninth Circuit

John Edward George,
Petitioner and Appellant,

vs.

The State of North Carolina,
Respondent and Appellee.

EXHIBIT "A" ATTACHED TO ANSWERING BRIEF FILED BY APPELLEE NELSON ON SEPTEMBER 6, 1968

Exhibit A

Policy Statement #21
Adopted: November 27, 1967

ADULT AUTHORITY POLICY STATEMENT PRISONER TRANSFERS TO CONCURRENT JURISDICTION

The following policy is broad in its scope and is prepared as a guide to Adult Authority panels when making case decisions concerning California prisoners being transferred to another State or Federal jurisdiction to serve a concurrent sentence there imposed upon them or to face criminal charges outstanding and from which may emanate a concurrent sentence. This policy is in harmony with courses of action provided for by the Agreement on Detainers (Section 1389 P.C.), the Western Interstate Corrections Compact (Section 11190 P.C.), and related statutory provisions (i.e., Section 2900 P.C.), Executive

Agreement Cases (Section 1548 and 1549 P.C.), and court law (In re Stoliker 49 Cal. 2d 75, and In re McClure 192 Cal. App. 2d 38) which renders transfer of such prisoners an administrative function.

In any such case it is Adult Authority policy that a Summary Report prepared by the Department of Corrections, and in which compliance or non-compliance with Section 5077 P.C. is certified, shall be considered as a Special Proceedings Calendar matter prior to the transfer. In cases where the prisoner previously has been interviewed by an Adult Authority Member regarding any commitment for which the sentence remains undetermined, a special action as appropriate to fix his sentence or to place him on calendar pursuant to Adult Authority Resolution No. 266 will be taken. If Section 5077 P.C. has not been complied with the prisoner will be scheduled for a personal appearance before an Adult Authority Member on the first available institution calendar. In any event, Adult Authority panel decisions will be made on an individual basis with all of the relevant facts of each case before them and will be guided by the following:

A. Fix or Refix California Term(s) to Discharge (NFPC) in favor of full jurisdiction of the other agency where a concurrent sentence is to be served;

   1. When the clinical profile is not one of high violence, and the prisoner is not a California resident, and a lengthy sentence already imposed in the other jurisdiction is adequate to provide for effective control and treatment.

   2. When California sentence is for non-violent behavior and incarceration for a concurrent sentence is to be in prisoner's home state or closely adjacent thereto.

3. When commitment offenses were non-violent, both in California and the other jurisdiction, and all parties will best be served by final disposition of term-fixing and releasing functions being assumed by the corresponding agency in the other jurisdiction.

4. When California commitment is for non-violent behavior, or is near its maximum expiration, and release to the full jurisdiction of another state on tried or untried charges will facilitate institutional and/or release programming by that jurisdiction.

B. Fix or Refix California Term(s) and Grant Parole, "To Go to Hold," to provide for concurrent institutional programming and cooperative arrangements with corresponding agencies in the other jurisdiction as they carry out their term fixing and releasing functions;

1. When California minimums have not been served, but rehabilitative progress is sufficient to support favorable prognostications.

2. When concurrent sentence to be served in the other jurisdiction is too short to provide for post-release parole supervision which the Adult Authority considers necessary for the welfare of the prisoner and of society.

3. When the California prisoner is to face an untried charge in a jurisdiction in or near his home state and case review indicates readiness for release to parole supervision irrespective of the outcome of the charge pending in the party state.

C. "Temporary Release from California Imprisonment Noted; Place on (a designated) Calendar" for further review;

1. When a California prisoner is transferred to a party state to face an untried indictment or warrant which may result in an additional prison sentence there, and the outcome of those proceedings may materially influence the Adult Authority's term-fixing decision.
2. When a California prisoner is transferred to another jurisdiction to serve a concurrent sentence already imposed, and evidence of continued rehabilitative progress while doing so may justify a decision to fix or refix the California term(s) to discharge or grant parole to cooperative supervision in another state—especially if the prisoner will be confined in or near his home state.
3. Where the California commitment offense was extremely serious and correctional treatment—controls beyond the statutory limits of a concurrent sentence in another jurisdiction are considered necessary—especially if prisoner is a California resident.

When any California prisoner has been transferred to another State or Federal jurisdiction to serve a concurrent sentence or to face criminal charges prior to Section 5077 P.C. having been complied with, it is Adult Authority policy that his case shall be prepared for scheduled presentation and review by an Adult Authority panel pursuant to Adult Authority Resolutions No. 184 and 266. Inabsentia actions will be taken as appropriate pending the prisoner's return to California imprisonment and compliance with Section

5077 P.C. A California detainer will be placed to effect return to custody of the Director of Corrections upon expiration of the sentence in the other jurisdiction.

Pursuant to Section 2081.5 P.C., case responsibility for preparation and presentation of scheduled progress reports to the Adult Authority regarding all prisoners transferred to concurrent jurisdiction shall be that of the Department of Corrections institution or division which is custodian of the complete case records during each prisoner's temporary absence from the custody of the Director of Corrections.

March 4, 1969

John Edward George v. State
of North Carolina
No. 22851

Clerk of the 9th Circuit
Court of Appeals
Ninth and Mission Streets
San Francisco, California 94118

Dear Sir:

During oral argument on the above-entitled action on February 28, 1969, the court granted me leave to consider whether I should stipulate to the admission into the record of additional documentation which the Deputy Attorney General sought at that time to introduce.

I have examined the material and discussed with the Deputy Attorney General the reasons for seeking its admission. I do not feel that the additional material has any relevance to the issues presently before this court and my discussions with opposing counsel have not persuaded me to the contrary. Accordingly, I must decline to stipulate to the admission to the record of this material at this late stage of the proceedings.

Yours very truly,

David B. Frohnmayer

cc: Mrs. Louise Renne
Deputy Attorney General

Office of the Attorney General, Department of Justice

[Letterhead]

State Building, San Francisco 94102

March 5, 1969

Hon. William B. Luck, Clerk
United States Court of Appeals
for the Ninth Circuit
P. O. Box 547
San Francisco, California 94101

Dear Mr. Luck:

Re: John Edward George v. State of North Carolina, No. 22851

During oral argument of the above-entitled matter on February 28, 1969, I moved that certain materials be filed with the Court to supplement and clarify the record already on file in this case. Those materials were as follows:

a. A Certification from the Records Officer of the California State Prison at San Quentin to the effect that the state of Kansas and Nevada placed detainers against the petitioner at a time prior to the detainer placed by North Carolina;

b. A letter recently received by the prison officials from the Office of the District Attorney at Reno, Nevada, stating that it is the intention of that office to exercise the "hold" against petitioner;

c. A letter from the Office of the District Attorney at Wichita, Kansas, to the same effect;

d. Correspondence between the Records Officer at San Quentin Prison and the Clerk of the Superior Court in Gastonia, North Carolina, with respect to the North Carolina detainer;

e. A copy of the Criminal Complaint upon which the Nevada detainer is based; and

f. The Warrant of Arrest upon which the Kansas detainer is based.

It was our view that these materials were relevant and particularly explained the Summary of Sentencing Data attached as Exhibit "B" to our "Opposition to 'Motion to Remand to District Court' and Motion to Dismiss Appeal."

We are in receipt of the letter of March 4, 1969 by counsel for the petitioner informing the Court that he declines to stipulate to the admission to the record of this material at this time. While the Court indicated at oral argument that a stipulation was necessary before these records would be filed, we believe that they should, in any event, be lodged with the Court in order that the Court have some idea of the matters upon which my motion was made.

An original and three copies of each document is enclosed.

Very truly yours,

THOMAS C. LYNCH
Attorney General

LOUISE H. RENNE (MRS.)
Deputy Attorney General

LHR:sq
Enclosure

cc: David B. Frohnmayer
Attorney for Petitioner

Department of Corrections
California State Prison [Letterhead]
San Quentin, California 94964

CERTIFICATION

Re: John Edward George
A-83856

I, Robert T. Powers, Records Officer of the California State Prison at San Quentin, an institution of the Department of Corrections do hereby certify that I am the custodian of the records and I am authorized to certify to such records.

I further certify that I have in my custody the records of John Edward George, A-83856, and these records show that subject has three detainers placed against him by out-of-state agencies: Warrant placed with the Department of Corrections on June 4, 1964 by the Marshal, Sedgwick County, Wichita, Kansas; Complaint placed with the Department of Corrections on June 10, 1964 by the Washoe County Police Department, State of Nevada; Warrant placed with the Department of Corrections on June 11, 1964 by the Police Department, Charlotte, North Carolina.

When a parole release date is granted by our Adult Authority, in cases where two or more detainers have been placed, it is our policy to notify the agency first placing a detainer of subject's availability to their custody. In the event that agency does not wish to exercise their detainer, the second agency will be notified, (according to chronological order), of subject's availability to their custody.

I certify under penalty of perjury that the foregoing is a true and correct statement to the best of my knowledge.

Done at San Quentin, California this 26th day of February 1969.

/s/ R. Powers
ROBERT T. POWERS
Records Officer

CALIFORNIA STATE PRISON AT SAN QUENTIN
RTP :lr

Office of the
DISTRICT ATTORNEY
County of Washoe [Letterhead]
Court House
Reno, Nevada 89501

February 14, 1968

Project Inside-Out, Inc.
328-30th Avenue
San Francisco, California 94121

Attention: C. Winthrop Forbush, Jr.

Gentlemen:

Re: John E. George

In reply to your letter of January 22, 1968, it is the intention of this office to exercise the hold against John E. George and return him to Nevada for trial when he is released from San Quentin, California.

Very truly yours,

WILLIAM J. RAGGIO
District Attorney

/s/ Herbert F. Ahlswede
HERBERT F. AHLSWEDE
Chief Criminal Deputy

HFA/vaw

OFFICE OF THE COUNTY ATTORNEY

[Letterhead]

County Court House - Fifth Floor - FOrest 3-2111
Sedgwick County - Wichita, Kansas 67203

February 7, 1968

Mr. C. Winthrop Forbish, Jr.
Project Inside-Out, Inc.
328-30th Avenue
San Francisco, California 94121

Re: John E. George
Warrant #64cr40

Dear Sir:

As you are aware, Mr. George was apprehended during a robbery of a finance company in San Francisco, California. He is charged here with robbing a finance company on the 4th day of November, 1963. He has had, from time to time, written to us, at first asserting his innocence, and as of late, asserting his potential to be a good member of society.

In October of 1967, I consulted with our Wichita Police Department as to the desire to continue in the prosecution in this case, and they indicated they did wish to continue in it and it is at this time my continued intent to prosecute Mr. George as soon as he is available to be returned to our city.

Yours truly,

/s/ DONALD FOSTER
Donald Foster
Deputy County Attorney.

DF/lkk

[Letterhead]

Department of Corrections
CALIFORNIA STATE PRISON
San Quentin, California 94964

April 21, 1967.
Re: GEORGE, John Edward
A-83856
Office of the Clerk
Superior Court
County of Gaston
Gastonia, North Carolina

Sir:

We are in receipt of your April 14, 1967 letter with regard to the above named subject presently confined to this institution.

The certified copy of Judgment of the Superior Court of Gaston County, North Carolina will be placed as a detainer, and your request for notification in advance of his release is noted in our records.

Please advise our office the name of the jurisdiction that should be notified, The State of North Carolina Prison Department, or the Office of the Sheriff, County of Gaston, Gastonia, North Carolina.

Your early reply will be appreciated, and be assured of our cooperation in matters of mutual concern.

Very truly yours,

LAWRENCE E. WILSON
Warden

/s/ W. C. SCHILLER
BY: W. C. SCHILLER
Records Officer

WCS:lr
cc: Martin R. Peterson
Prisoner Rehab Director
North Carolina Prison Department

Dear Mr. Schiller:

With regard to your letter of April 21, 1967, a copy of which appears above, notice of a release date and of details of assuming custody should be furnished both to the Sheriff of Gaston County and to the Clerk of Superior Court of Gaston County, at Gastonia, North Carolina.

Gastonia, N. C.,

April 29, 1967.

Very truly yours,

/s/. GEORGE C. HOLLAND
George C. Holland
Clerk of Superior Court

STATE OF NEVADA, }
County of Washoe. } ss.

HARRY Z. GUERIN being first duly sworn, deposes and says: That he is the duly qualified and acting Justice of the Peace of SPARKS Township, in and for the County of Washoe, State of Nevada; that the foregoing copy of complaint in the case of the State of Nevada vs. JOHN E. GEORGE, AKA JESSIE MOORE is a full, true and correct copy of the complaint in said case filed in my office on the 17th day of DECEMBER, 1963, and that the foregoing copy of the warrant of arrest in said case is a full, true and correct copy of the warrant issued by me upon the said complaint on the 17th day of DECEMBER, 1963, for the arrest of the said JOHN E. GEORGE, AKA JESSIE MOORE

Harry Z. Guerin

Subscribed and sworn to before me this 17th day of DECEMBER, 1963

H K Brown

County Clerk of Washoe County, and ex-officio Clerk of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe.

STATE OF NEVADA, }
County of Washoe. } ss.

I, H. K. BROWN, County Clerk and ex-officio Clerk of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, do hereby certify that on the 17th day of DECEMBER, A. D. 1963, the said HARRY Z. GUERIN was, and now is at the date hereof, the duly qualified and acting Justice of the Peace of the Justice's Court of SPARKS Township, in and for the County of Washoe, State of Nevada, a court without a seal or a clerk thereof; and I further certify that I am well acquainted with the signature of the said HARRY Z. GUERIN, and that his signature subscribed to the foregoing certificate and affidavit is true and genuine.

RECEIVED

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court, at Reno, on the 17th day of DECEMBER, 1963

H K Brown

County Clerk of Washoe County, and ex-officio Clerk of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe.

THE WITHIN INSTRUMENT IS A CORRECT COPY OF THE ORIGINAL ON FILE IN THIS OFFICE.
ATTEST:
CALIFORNIA STATE PRISON AT SAN QUENTIN
BY M. S. Metzler
RECORDS OFFICER

THE STATE OF NEVADA, Plaintiff,

AGAINST

JOHN E. GEORGE, AKA JESSIE MOORE
Defendant

CRIMINAL COMPLAINT

Personally appeared before me this day SAM COSTA
of SPARKS Township, in the County of Washoe, State of Nevada, who complains and says that JOHN E. GEORGE, AKA JESSIE MOORE
the defendant above named, has committed the crime of ROBBERY
in the manner following, to-wit:

That the said defendant on or about the 22nd day of NOVEMBER, 1963 at ~~Reno~~ Sparks Township, in the County of Washoe, State of Nevada, did then and there wilfully unlawfully, feloniously and violently, and by means of force and violence, take and obtain from the person of RON CORNILLIES, the sum of Two Hundred Seventy One and no/100 ($271.00) Dollars, lawful money of the United States, which said money was the property of the Beneficial Finance Company of Sparks, Inc.

All of which is contrary to the form of Statute in such cases made and provided and against the peace and dignity of the State of Nevada. Said complainant therefore prays that a warrant be issued for the arrest of said defendant and that he may be dealt with according to law.

Subscribed and sworn to before me this 17th 13th day of DECEMBER, 1963

Harry Z. Gurrin
Justice of the Peace of Said Township.

THE WITHIN INSTRUMENT IS A CORRECT COPY OF THE ORIGINAL ON FILE IN THIS OFFICE.
ATTEST:
CALIFORNIA STATE PRISON AT SAN QUENTIN
BY W. L. Metzler

64 CR 40

STATE OF KANSAS, SEDGWICK COUNTY, ss.

THE STATE OF KANSAS, to R. D. Stephens Marshal of the Court of Common Pleas, in and for said County.

WHEREAS, Complaint in writing, under oath, has been made in the Court of Common Pleas, Wichita, Sedgwick County, and it appearing that there are reasonable ground for believing that on or about the 4th day of November ,A.D., 1963 , in Sedgwick County, and State of Kansas, one JOHN EDWARD GEORGE A 83554 did then and there unlawfully, feloniously, wilfully

take the property of another, to-wit: $76.00 in United States Currency belonging to and being the property of Community Finance Company, Inc., 140 North Broadway, Wichita, Sedgwick County, Kansas, in the presence of and against the will of Charles L. Riggs, by putting him, the said Charles L. Riggs in fear of some immediate injury to his person;

all of the said acts of the said JOHN EDWARD GEORGE being

THE WITHIN INSTRUMENT IS A CORRECT COPY OF THE ORIGINAL ON FILE IN THIS OFFICE.
ATTEST:
CALIFORNIA STATE PRISON AT SAN QUENTIN
BY M. S. Melcher RECORDS OFFICER
(AFFIX SEAL)

Contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the State of Kansas. Section 21-527, 1949 G.S.K.

You are, therefore, commanded forthwith to arrest said JOHN EDWARD GEORGE and bring him before said Court, in said County to answer said charge; and then and there return this writ.

Witness my hand in Wichita, in Sedgwick County, Kansas.

this 6th day of January , 1964.

Ellen Hale

Clerk of the Court of Common Pleas, Wichita, Sedgwick County, Kansas.

By K. Angley, Deputy.

STATE OF KANSAS } SS
SEDGWICK COUNTY }

I, ELLEN HALE, Clerk of the Court of Common Pleas of Sedgwick County, Kansas, hereby certify that the within is a true, correct and complete copy of the original instrument filed in this office on the 6 day of Jan 19 64

Ellen Hale, Clerk

K. Angley Deputy

23

David B. Frohnmayer
Attorney at Law
1900 Standard Oil Building
225 Bush Street
San Francisco, California 94104

March 7, 1969

John Edward George v. State of North Carolina, No. 22851

Honorable William B. Luck, Clerk
United States Court of Appeals
for the Ninth Circuit

Post Office Building
Seventh and Mission Streets
San Francisco, California 94101

Dear Mr. Luck:

I have just received a copy of the communication directed to your office by the Deputy Attorney General dated March 5, 1969.

This letter details certain material with which the Deputy Attorney General proposed at oral argument to amplify the record in the above-entitled case. The Court there stated that this material would be admitted at this late date only pursuant to my stipulation. By my letter dated March 4, 1969, on behalf of the petitioner I declined to stipulate to the admission of this material. I continue to adhere to this position. The material, in my estimation, is not only irrelevant, but does not comply in any event with the Federal Rules of Appellate Procedure regarding the appropriate contents of exhibits in briefs on appeal in cases of this sort.

Although there is nothing in the material forwarded to the Court which, properly considered, is prejudicial to the petitioner, even the most remote chance that these items might prejudice the petitioner in any manner would dictate that I register my continuing objection to the lodging of this material, formally or informally, with the Court in a manner contrary to the Court's directive.

Yours very truly,
David B. Frohnmayer
Attorney for Petitioner
Appellee

United State Court of Appeals

For The Ninth Circuit

No. 22,851

John Edward George,
Appellant,

vs.

Lewis S. Nelson, Warden, California State Prison, San Quentin; and Warden of North Carolina State Prison,
Appellees.

[May 9, 1969]

Appeal from the United States District Court
for the Northern District of California

Before: HAMLEY, HAMLIN and KOELSCH, Circuit Judges

HAMLEY, Circuit Judge:

John Edward George, in custody at California State Prison, San Quentin, appeals from a district court order denying his application for a writ of habeas corpus.

On April 27, 1964, George was convicted in a California state court, on a plea of guilty, of robbery in the first degree and began serving his sentence of five years to life at San Quentin. On July 20, 1966, George was released to North Carolina authorities to stand trial in that state upon a North Carolina robbery charge. This was done pursuant to California Penal Code section 1389 (1963), and North Carolina G.S. § 148-89, known as the interstate "Agreement on Detainers."

George was tried in Gaston County, North Carolina, on February 8, 1967, and was convicted on the North Carolina charge. He was sentenced to imprisonment for from twelve to fifteen years. The conviction was thereafter affirmed. *State v. George,* 271 N.C. 438, 156 S.E. 2d 845.

However, George did not begin service of the North Carolina sentence. He was returned to San Quentin to complete service of his California sentence after which he is to serve his North Carolina sentence. On April 14, 1967, North Carolina authorities wrote to San Quentin, placing a detainer on George so that he would in due course be returned to North Carolina for this purpose.

In his habeas corpus application thereafter filed in the United State District Court for the Northern District of California, George did not attack his California conviction, but rather challenged the North Carolina conviction. He alleged, in effect, that: (1) in the North Carolina prosecution he was not tried within the period permissible under the California and North Carolina detainer statutes, and the North Carolina court was therefore without jurisdiction, this constituting a denial of due process; (2) he was denied his constitutional right to a speedy trial in North Carolina; and (3) he was convicted on testimony known by North Carolina prosecuting officials to be perjured.[1] George asserted in his application that he wanted the validity of the North Carolina conviction determined now because it, together with the North Carolina detainer, adversely affects favorable consideration of parole and reduced custodial classification by California authorities.

---

[1]George alleged that he presented the first two of these grounds for relief in his direct appeal in North Carolina. He did not allege in his application that he presented the perjury ground in any North Carolina state court proceeding.

On March 1 and 20, 1968, the district court denied the application for a writ on the ground that *McNally v. Hill*, 293 U.S. 131, foreclosed habeas corpus relief on the North Carolina conviction while George was still in custody under the prior California judgment. George appealed to this court on April 3, 1968.

On May 20, 1968, the United States Supreme Court in *Peyton v. Rowe*, 391 U.S. 54, overruled *McNally v. Hill*. The Supreme Court held that a prisoner serving consecutive sentences is "in custody" under any one of them for purposes of 28 U.S.C. § 2241 (c)(3) (1964), and may, in a federal habeas corpus proceeding thereunder, challenge the constitutionality of a sentence scheduled for future service.

George then moved in this court for an order remanding the cause to the district court for further proceedings in the light of *Peyton v. Rowe*. In a supplemental brief thereafter filed George in effect asserted, as an additional reason why the validity of the North Carolina conviction should be determined at this time, that a delay in making this determination will lessen the chance that substantial justice will be done with regard to the North Carolina conviction.[2]

The California warden opposed the motion to remand, arguing that he is not a proper party insofar as George is challenging the North Carolina conviction, and that an appropriate North Carolina party is an indispensable party.[3]

---

[2]George thereby invoked the reasons stated in *Peyton v. Rowe*, 391 U.S. 54, 62, 64 (the dimming of memories, death of witnesses, and incarceration when entitled to release) why habeas applicants are entitled to attack all outstanding convictions without delay.

[3]While George named the "Warden, North Carolina State Prison (Name Unknown)" as a respondent in his amended application in this habeas corpus proceeding, there is nothing in the record before us to indicate that process has been served upon the North Carolina warden.

The California warden further argued that the United States District Court for the Northern District of California did not have jurisdiction to entertain this habeas proceeding. We passed consideration of the motion to the hearing of the appeal on the merits.

In *Peyton v. Rowe,* the consecutive or successive sentences were imposed by the same sovereign. Here the first sentence was imposed against George by a California court, and the second was imposed by a North Carolina court. However, the rule established in *Rowe* that a federal habeas applicant may attack the validity of a second sentence without awaiting completion of service of the first sentence, applies even though the two sentences were imposed by different sovereigns. *Word v. North Carolina,* 4 Cir., 406 F.2d 352, 355; *United States ex rel. Van Scoten v. Commonwealth of Pennsylvania,* 3 Cir., 404 F.2d 767, 768.

This brings us to the question of whether, under the circumstances of this case, a habeas proceeding should be entertained in the district of confinement (California) or in the district of sentencing (North Carolina).

Since George is in state custody in the Northern District of California, we think that district court has jurisdiction to entertain the habeas application. Title 28 U.S.C. § 2241(a) provides that writs of habeas corpus may be granted by the district courts "within their respective jurisdictions." In *Ahrens v. Clark,* 335 U.S. 188, the Supreme Court held that this phrase means the district in which the petitioner is detained or confined when the petition is filed.[4] See Also, *Ashley v. Washington,* 9 Cir., 394 F.2d 125, 126.

---

[4]As observed by the Fourth Circuit in *Word v. North Carolina,* 406 F.2d 352, this rule of *Ahrens* has been departed from in the case of applicants resident outside of the United States, and perhaps in certain other exceptional circumstances.

It is also our view that, while the challenged judgment is that of North Carolina, the California warden is a proper respondent. He is the actual custodian of George by reason of the California conviction and also as agent of the North Carolina warden, as evidenced by the detainer. If the California warden does not wish to defend the North Carolina conviction he can call upon the authorities of North Carolina to provide that defense.

In holding that the California district court has jurisdiction, we have not overlooked the fact that the Fourth Circuit, in *Word v. North Carolina,* 4 Cir., 406 F.2d 352, has reached a contrary result. The *Word* court affirmed the dismissal of two habeas applications filed in a Virginia district court by Virginia prisoners challenging North Carolina convictions. In doing so, however, the Fourth Circuit did not seem to announce a categorical rule that a district court in the district of custody could never assume jurisdiction. Instead, it said ". . . the latter, where permissible [is] infrequently preferable."

We recognize that, under the law of the Fourth Circuit, as established in the *Word* decision, a federal district court in North Carolina could have entertained George's application. It was there held that a North Carolina district court should not have dismissed, on jurisdictional grounds, the habeas application of a Virgina prisoner who sought to set aside a North Carolina conviction.[5] But the problem before us is

---

[5]The rule is to the contrary in the Ninth Circuit. In *Ashley v. Washington,* 9 Cir., 394 F.2d 125, this court held that a state prisoner in Florida custody under a Florida judgment, faced with a detainer filed by the State of Washington, could not challenge the Washington conviction upon which the detainer was based, in a habeas proceeding brought in a Washington district court. To like effect, see *Van Scoten v. Commonwealth of Pennsylvania,* 3 Cir., 404 F.2d 767.

not whether a district court in North Carolina could have entertained George's application, but whether the district court in California, where the application was filed, had jurisdiction. We do not now pass upon the question of whether the California district court may, after this remand, transfer the cause to the North Carolina district court pursuant to 28 U.S.C. § 1404(a) (1964).

It cannot be denied that the entertaining of such proceedings in the state of confinement rather than the state where the challenged conviction was obtained presents practical problems. But, likewise, a rule requiring the prisoner to seek relief in the latter state presents practical problems. They are discussed at some length in the opinions filed in *Word v. North Carolina*. We do not see how a disposition of this appeal can avoid one set of problems or the other. Perhaps new judicially or legislatively-fashioned techniques are needed to meet these problems, now that *Peyton v. Rowe* has assured state prisoners an immediate right to attack convictions not yet being served. But all that is presented to us at this time are the questions of California district court jurisdiction and indispensability of parties.

Reversed and remanded for further proceedings.

United States Court of Appeals for the Ninth Circuit

Excerpt from Proceedings of Wednesday, June 18th, 1969

Before: HAMLEY, HAMLIN and KOELSCH, Circuit Judges

ORDER DENYING PETITION FOR REHEARING

On consideration thereof, and by direction of the Court, IT IS ORDERED that the petition of Appellee's filed May 23, 1969 and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is denied, and suggestion for rehearing en banc is rejected.

[Letterhead]

BROBECK, PHLEGER & HARRISON
Attorneys at Law
One Eleven Sutter Street
San Francisco 94104
(415) 434-0900

December 24, 1969

Mrs. Louise H. Renne, Esq.
Deputy Attorney General
6000 State Building
San Francisco, California 94102.

Re: Nelson v. George, U.S. Sup. Ct.
Oct. Term 1969, No. 595

Dear Mrs. Renne:

I have your letter of December 18, 1969, and the accompanying list of documents designated by petitioner for inclusion in the Single Appendix to be prepared in this case. I know of no other documents of record that need be designated.

However, I note that you have also designated certain documents that were merely lodged with the Court of Appeals, *viz.*, those designated as

> "4. Letter dated March 5, 1969 from counsel for appellee Nelson to Clerk, Court of Appeal, with *accompanying documents* which were lodged with Court on March 6, 1969."

We have previously discussed this matter and I believe we are in agreement that, so far as is known, these documents are not a part of the record in the Court of Appeals. Accordingly, I must object to the inclusion in the Single Appendix of these documents *dehors* the record below.

In order that this objection be reflected in the materials before the Supreme Court, respondent cross-designates this letter for inclusion in the Single Appendix.

Very truly yours,
/s/ George A. Cumming, Jr.
George A. Cumming, Jr.

GAC:jt
cc: David B. Frohamayer, Esq.
Mr. John E. George
Mrs. Helen K. Loughran

In the Supreme Court of the United States

OCTOBER TERM, 1968

LOUIS S. NELSON, Warden, San Quentin Prison; and Warden of North Carolina State Prison,

Petitioners,

vs.

JOHN EDWARD GEORGE,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

THOMAS C. LYNCH
Attorney General of the State of California

EDWARD P. O'BRIEN
Deputy Attorney General

LOUISE H. RENNE (MRS.)
Deputy Attorney General
6000 State Building
San Francisco, California 94102
Telephone: (415) 557-1337

Attorneys for Petitioner Nelson

BORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. .... Misc.

LOUIS S. NELSON, Warden, San Quentin Prison; and Warden of North Carolina State Prison,

Petitioners,

vs.

JOHN EDWARD GEORGE,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioner Louis S. Nelson, Warden, San Quentin Prison, State of California, appellee below, respectfully petitions that a writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit to review the decision of that Court entered on May 9, 1969 reversing and remanding the order of the United States District Court.

OPINIONS BELOW

The opinion of the Court of Appeals is as yet unreported and is appended hereto as Appendix A. The opinions of the United States District Court for the Northern District of California are unreported and are appended hereto as Appendices B, C and D.

JURISDICTION

On May 9, 1969, the United States Court of Appeals for the Ninth Circuit reversed the order of the United States District Court for the Northern District of California dismissing John Edward George's petition for writ of habeas corpus. A timely petition for rehearing was filed and was denied on June 18, 1969. The jurisdiction of this Court is invoked under Title 28, United States Code section 1254(1).

QUESTIONS PRESENTED

1. Whether the Warden of a California state prison is a proper party respondent in a federal habeas corpus proceeding in which a state prisoner serving only a California sentence seeks to collaterally attack a future consecutive North Carolina sentence which has been given no effect in California; and, if not, whether the mere filing of a detainer by North Carolina requires a different result.

2. Whether the Court of Appeals correctly determined that the District Court for the Northern District of California had jurisdiction to inquire into the validity of the North Carolina conviction.

STATUTE INVOLVED

This case involves interpretation of the federal Habeas Corpus Act, Title 28, United States Code sections 2241-2255.

STATEMENT OF THE CASE

INTRODUCTION

This case arises in the aftermath of this Court's decision in *Peyton v. Rowe,* 391 U.S. 54 (1968) overruling *McNally v. Hill,* 293 U.S. 131 (1934) and holding that a state prisoner serving consecutive sentences is "in custody" under Title 28, United States Code section 2241(c)(3). In *Peyton*

v. Rowe, supra, the consecutive sentences were imposed by the same state. The questions posed by this case arise because the consecutive sentences have been imposed by separate sovereign states. Recently these questions have been answered in conflicting fashion by three courts of appeals —by the United States Court of Appeals for the Ninth Circuit in this case; by the United States Court of Appeals for the Fourth Circuit in *Word v. North Carolina,* 406 F.2d 352 (4th Cir. 1969); and by the Third Circuit Court in *Van Scoten v. Commonwealth of Pennsylvania,* 404 F.2d 767 (3d Cir. 1968). The questions raised pose important practical and legal problems to all concerned.

The facts and proceedings with respect to this case are as follows:

A. Proceedings in the State Courts.

On April 27, 1964, John Edward George, the petitioner for writ of habeas corpus below, and respondent in this Court, was convicted in the San Francisco Superior Court of a violation of California Penal Code section 211 (robbery in the first degree). *People v. John Edward George,* No. 62815. He was sentenced to state prison for the term prescribed by law. Under California Penal Code section 213 the sentence imposed by law is an indeterminate five years to life sentence.

Following his conviction detainers were filed in California by the states of Kansas, Nevada, and North Carolina on June 4, 10 and 11, 1964, respectively. (Summary of Sentence Data, Exhibit B of petitioner's "Opposition to 'Motion to Remand to District Court' and Motion to Dismiss Appeal," filed below.)

Thereafter, on or about July 20, 1966, pursuant to California Penal Code section 1389 "The Agreement on Detainers" and at his request, George was released to North

Carolina to stand trial in that state upon a North Carolina robbery charge which underlay the detainer (CT 17).[1] Following his conviction in North Carolina, which was affirmed by the North Carolina Supreme Court in *State v. George,* 271 N.C. 438, 156 S.E.2d 845 (1967), and from which certiorari in this Court apparently was not sought, George was returned to California to complete his California sentence. As George alleged below, service on his North Carolina sentence will not begin until he returns to North Carolina (CT 40-41).

B. Proceedings in the Federal Courts.

1. PROCEEDINGS IN THE DISTRICT COURT.

On December 7, 1967, George filed a petition for writ of habeas corpus in the United States District Court, Northern District of California, in an action entitled "John Edward George v. State of North Carolina" in which he challenged only his North Carolina conviction (CT 1-13). On January 10, 1968, the District Court denied the petition with leave to amend on the ground that George had failed to name a proper party respondent (CT 14, Appendix B).

Thereafter, on February 26, 1968, George amended his petition and in an action entitled "John Edward George v. L. S. Nelson, Warden, San Quentin State Prison (in the capacity as Agent for State of North Carolina) and Warden, North Carolina State Prison (Name Unknown)" again brought suit in the District Court challenging his North Carolina conviction (CT 15-37). He alleged that he was not tried in North Carolina within the period of time permissible under the Agreement on Detainers. Accordingly, he urged that the North Carolina court

1. References are to the Clerk's Transcript on Appeal from the order of the District Court.

was without jurisdiction to proceed, and that he was denied his constitutional right to a speedy trial in North Carolina. He also alleged that he was convicted on the basis of known perjured testimony.[2] On March 1, 1968, the Court again denied the petition on the ground that in the absence of a specific allegation, it was assumed that George was serving concurrent sentences on the California and North Carolina convictions. Since George would not be entitled to release even if his North Carolina conviction was held to be illegal, the Court held that *McNally v. Hill,* 293 U.S. 131 (1934) required denial of the petition (CT 38-39).

On March 15, 1968, George filed a petition for rehearing on the ground that commencement of service on the North Carolina sentence would not begin until he was in "actual custody" of the North Carolina Prison authorities, that the effect of the North Carolina sentence was therefore consecutive, and that *McNally v. Hill, supra,* did not apply (CT 40-42).

On March 21, 1968, however, the District Court denied the motion for rehearing, holding that the "*McNally* rule is equally applicable to the situation when the sentence imposed pursuant to the conviction under attack is to be served after, rather than concurrently, with the valid sentence." (CT 43-44).

On April 25, 1968, the Court ordered that the motion for certificate of probable cause be granted (CT 47).

2. PROCEEDINGS IN THE COURT OF APPEALS.

On or about June 20, 1968, and prior to the filing of an opening brief in the Court of Appeals, George filed a motion

2. The Ninth Circuit noted, *infra,* that George alleged that he presented the first two of these grounds for relief (lack of jurisdiction and denial of right to speedy trial) in his direct appeal in North Carolina. He did not allege in his application that he presented the perjury ground in any North Carolina state court proceeding.

to remand the proceedings for further consideration on the ground that *Peyton v. Rowe, supra,* had since been decided overruling *McNally v. Hill, supra,* and had held that a prisoner serving consecutive sentences is "in custody" under Title 28, United States Code section 2241(c)(3). Accordingly, he argued that *Peyton v. Rowe, supra,* required that his case be remanded to the District Court in order to have the merits of his alleged federal claims adjudicated.

Following an order dated June 12, 1968, by the United States Court of Appeals for the Ninth Circuit setting the date of July 1, 1968, for the submission of the motion, the named-respondent below, Warden Nelson of San Quentin Prison, filed an "Opposition to 'Motion to Remand District Court' and Motion to Dismiss Appeal." He urged that the appeal should be dismissed because: (1) the warden was not a properly named party respondent in an action seeking to set aside a North Carolina conviction which had not been given any effect in California, and (2) the District Court for the Northern District of California was without jurisdiction to inquire into the validity of the North Carolina conviction. This was the first pleading filed by the petitioner Nelson.

After a closing brief was filed by George on or about July 22, 1969, the Court of Appeals by order dated July 12, 1968, passed the matter to a hearing on the merits. Petitioner Nelson filed an Answering Brief, and after the appointment of counsel for George a "Petitioner-Appellant's Reply Brief" was filed by counsel on his behalf, urging that Warden Nelson was a proper party respondent by which to attack the North Carolina conviction and that the California District Court had jurisdiction to inquire into the validity of the conviction.

Oral argument was held on February 28, 1968. At the argument counsel for petitioner attempted to show the cur-

rent status with respect to the detainers filed by Kansas and Nevada (*supra*, 3), and that, according to California practice, detainers were honored in the order received. The Court stated it would consider these matters only if counsel for respondent George so stipulated. He did not.

Thereafter, the Ninth Circuit Court on May 9, 1969 issued its opinion reversing the District Court and remanding the case to the District Court for further proceedings. In reaching that decision the Court held, *inter alia*, that the California warden was a proper respondent since "[h]e is the actual custodian of George by reason of the California conviction and also as agent of the North Carolina warden, as evidenced by the detainer. If the California warden does not wish to defend the North Carolina conviction he can call upon the authorities of North Carolina to provide that defense." In also holding that the California district court as the district of confinement was the proper court in which to bring an action of this kind, the Court frankly recognized that its decision was directly contrary to a recent decision rendered by the Fourth Circuit in *Word v. North Carolina*, 406 F.2d 352 (1969). In that case the Court had held that the district of sentencing rather than the district of confinement was the proper jurisdictional court in which to bring suit. Following the issuance of the Ninth Circuit decision a timely petition for rehearing and suggestion for rehearing en banc was filed by petitioner. That petition was denied on June 18, 1968.

REASONS FOR GRANTING THE WRIT

There are many important legal and practical reasons for granting this petition for writ of certiorari. First, issuance of the writ is necessary to resolve a conflict among the circuit courts. Thus, as indicated above, the decision of

the Ninth Circuit Court holding that the place of confinement is the proper district in which to bring a habeas proceeding in a case of this kind is contrary to the Fourth Circuit decision in *Word v. North Carolina, supra,* holding that the district of sentencing is the proper jurisdictional district. In *Word* the Fourth Circuit held that Virginia state prisoners challenging future consecutive North Carolina sentences could seek habeas corpus relief in a North Carolina federal district court. We believe that neither decision is compelled by *Peyton v. Rowe, supra.*

Word is contrary to *Van Scoten v. Pennsylvania, supra,* recently decided by the Third Circuit holding that a New Jersey state prisoner could not challenge a future Pennsylvania state sentence in a Pennsylvania district court. In *Van Scoten,* however, the court did not consider the further question raised here of whether the prisoner could sue in the district of confinement. Lower federal court decisions can only reflect this conflict among the circuits.[3] There are important questions of comity and federal-state relationships to be resolved by this case.

Similarly, in addition to the purely legal implications raised by this case the practical implications raised are very important. Clearly, the warden of a California state prison is not equipped to defend a North Carolina conviction. He is not an agent for any other state. On the other

---

3. See, *e.g.*, the unreported decision in the consolidated cases of *Lowrie v. California Adult Authority, et al.*, Civil No. 1425L and *Eskew v. State of California,* Civil No. 1451L (C.D. Neb. 1968), holding that a Nebraska district court is powerless to act with respect to a detainer filed by California authorities and that the effect of the detainer, if any, upon incarceration does not raise a federal question; but see *Sloupe v. Peyton,* 290 F.Supp. 741 (E.D. Vir. 1960) holding that an allegation that a Maryland detainer reduced the possibility of Virginia parole and thereby lengthened delay in a Maryland trial thus denying a right to speedy trial, raised a federal question in a Virginia district court.

hand jurisdiction has not been obtained over North Carolina officials and there is no assurance that officials of North Carolina or any other state would voluntarily submit to the jurisdiction of a district court sitting in another state. Should they not voluntarily consent to suit in another jurisdiction it is highly questionable whether any judgment imposed upon any other state official would have any binding effect upon them in another jurisdiction. Assuming *arguendo,* however, that counsel for North Carolina would defend an action in California, the burden of having to transport court records and/or witnesses to California when necessary is clear, even assuming that it would be practically possible to do so. The contrary solution reached by the Fourth Circuit in the *Word* decision poses equally grave, legal and practical problems.

Certainly the decision of this Court in *Peyton v. Rowe, supra,* does not require the outcome demanded by the Ninth Circuit or the contrary result reached by the Fourth Circuit. The important questions of comity and federal-state relationships raised by this case can only be resolved by this Court.

ARGUMENT

I. Since the Warden of San Quentin Prison Is Not an Agent for North Carolina and the District Court Does Not Otherwise Have Jurisdiction It Was Error for the Ninth Circuit to Hold That the California District Court Had Jurisdiction to Review the North Carolina Conviction.

The Ninth Circuit held that the Warden of San Quentin Prison was an agent for the State of North Carolina because that state had filed a detainer in California. Accordingly, the Court held that Warden Nelson was a proper party respondent in this habeas corpus proceeding and that the District Court of Northern California accordingly had

jurisdiction to review the North Carolina judgment. In our opinion this decision is wrong and *Peyton v. Rowe, supra,* does not compel that result.

A. THE WARDEN OF SAN QUENTIN PRISON IS NOT A PROPER PARTY RESPONDENT IN A HABEAS CORPUS PROCEEDING BROUGHT BY A CALIFORNIA STATE PRISONER SEEKING TO COLLATERALLY ATTACK A SISTER-STATE CONVICTION WHICH HAS NOT BEEN GIVEN EFFECT IN CALIFORNIA; AND THE MERE FILING OF A DETAINER BY THE SISTER-STATE DOES NOT MAKE THE WARDEN OF SAN QUENTIN AN AGENT FOR THAT PURPOSE.

In *Peyton v. Rowe,* 391 U.S. 54 (1968) this Court overruled *McNally v. Hill, supra,* and held that a prisoner serving consecutive sentences is "in custody" under any one of them for purposes of Title 28, United States Code section 2241(c)(3). Accordingly, it was held that a state prisoner could challenge the constitutionality of a sentence to be served in the future in a federal habeas corpus proceeding.

In *Peyton v. Rowe, supra,* however, the consecutive sentences were imposed by one sovereign state for crimes committed within that state. Here the consecutive sentences have been imposed by separate sovereign states for separate criminal acts. Neither state has given effect to the conviction rendered by the other. We think that this case therefore is entirely different from that presented by *Peyton v. Rowe,* and that under our federal system *Peyton v. Rowe* is inapplicable.

Nevertheless, the Ninth Circuit found *Peyton v. Rowe, supra,* to be applicable in a case such as this and in reaching that decision found the Warden of San Quentin Prison to be a proper party respondent for the purpose of challenging the sister-state conviction. The Court reached that conclusion on the theory that Warden Nelson was an agent for North Carolina because that state had filed a detainer in California.

Thus, the Court held that:

> "It is also our view that, while the challenged judgment is that of North Carolina, the California warden is a proper respondent. He is the actual custodian by reason of the California conviction and also as agent of the North Carolina warden, as evidenced by the detainer. If the California warden does not wish to defend the North Carolina conviction he can call upon the authorities of North Carolina to provide that defense."

The conclusion that Warden Nelson is an agent for North Carolina and therefore a proper party to be named in this action is not supported in fact or law.

Thus, it is clear that George is presently in custody at San Quentin Prison solely as the result of his California conviction. His North Carolina sentence will not begin to run until he is in the actual custody of the North Carolina authorities. Under California Penal Code section 1389, et seq., the State of California at George's request relinquished control and custody of George in order to permit him to stand trial in North Carolina. However, when George was received back into custody by the California authorities no custodial obligations were assumed by California on behalf of North Carolina.

It has long been held that the custodian of the petitioner is an indispensable party in an application for federal habeas corpus brought pursuant to the provisions of Title 28, United States Code section 2241, et seq. The rationale behind this requirement is a necessity that the Court gain jurisdiction over the person of one empowered to deliver the body of the petitioner if the custody should be declared illegal. *King v. State of California*, 356 F.2d 950 (9th Cir. 1966); *Morehead v. State of California*, 339 F.2d 170 (9th Cir. 1964); *Roseborough v. State of California*, 322 F.2d

788 (9th Cir. 1963); *Bohm v. State of Alaska,* 320 F.2d 851 (9th Cir. 1963). This rule is well-founded within the context of the previous rule of *McNally v. Hill, supra,* and within the specific factual circumstances of *Peyton v. Rowe, supra,* where one state has imposed all sentences for the crimes involved. However, a custodian for purposes of one State's judgment is not a custodian for another under our federal system. There is nothing in *Peyton* which is addressed to the problem here presented where separate convictions are imposed by separate sovereignities for separate criminal acts. That decision does not suggest the result reached here or in *Word.* Indeed, what the Court did indicate is to the contrary. Thus, in justifying *Peyton* it said:

> "Meaningful factual hearings on alleged constitutional deprivations can be conducted before memories and records grow stale, *and at least one class of prisoners* [emphasis supplied] will have the opportunity to challenge defective convictions and obtain relief without having to spend unwarranted months or years in prison." *Peyton v. Rowe, supra,* 65.

There is no action which Warden Nelson can take which will affect the North Carolina conviction. Similarly, this is not a case where California has given some effect to the conviction as, for example, by increasing punishment or by rendering habitual criminal status applicable because of the other conviction. Thus, cases like *United States ex rel. Durocher v. LaVallee,* 330 F.2d 303, 306 (2d Cir. 1964), *cert. denied,* 377 U.S. 998 (1964) which have permitted attack against a sister-state conviction in such circumstances, are inapplicable.

Similarly, the mere filing of a detainer cannot render the Warden of San Quentin Prison an agent for a sister-state. An interstate detainer is a request, in the form of a war-

rant, complaint, or hold order, notifying the incarcerating state that the prisoner is wanted in another jurisdiction and requesting that the demanding state be notified of the prisoner's availability for custody. It may be filed either as a result of a conviction or as a result of an untried charge. California follows the practice of honoring detainers it deems valid in the order filed, and when a detainer is exercised custody of the prisoner may be obtained either through formal extradition proceedings or by waiver of the prisoner. In a case like the present one where the prisoner has requested to be released to another jurisdiction for trial, in accordance with the Agreement on Detainers, extradition is deemed waived. See California Penal Code section 1349 (Art. III, (e)).

Indeed, the questionable soundness of designating Warden Nelson an agent for North Carolina because a detainer has been filed, is currently demonstrated by a case now pending in the United States District Court for the Northern District of California, *John Edward George v. Louis S. Nelson, Warden, San Quentin State Prison and State of Kansas, Donald Foster, Agent for Same,* Case No. 51720. The Supreme Court may take judicial notice of cases pending in lower federal courts. *Brown v. Board of Education of Topeka,* 344 U.S. 1 (1952).

In the district court case George has filed a habeas corpus petition seeking to set aside the Kansas detainer based upon an untried robbery charge on the ground that he has been denied a right to speedy trial in Kansas. Kansas is not a party to the Interstate Agreement on Detainers, whereas North Carolina is. While the Kansas detainer is based upon an untried robbery charge and the North Carolina detainer is based upon a conviction, both detainers notify California

that George is wanted in another jurisdiction and request notification of his availability for custody.

A show cause order now has been issued by the district court. In view of Kansas' detainer the effect of the Ninth Circuit decision may be to constitute Warden Nelson not only an agent for North Carolina, but also, perhaps, to make him an agent for Kansas. Neither result is required by *Peyton v. Rowe, supra,* or any extension of that decision.

B. THE DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA IS OTHERWISE WITHOUT JURISDICTION TO REVIEW THE NORTH CAROLINA CONVICTION.

Title 28, United States Code section 2241 provides, *inter alia,* that the District Court may issue a writ of habeas corpus only within its respective jurisdiction. Accordingly, this Court has held that the petitioner must be in custody within the jurisdiction of the court in order for the jurisdiction of the court to attach and for relief to be granted. *Ahrens v. Clark,* 335 U.S. 188 (1948); *Ex parte Endo,* 323 U.S. 283 (1944). To the extent the Court of Appeals held that petitioner could not have brought suit in North Carolina, the decision in this case is consonant with Supreme Court law. *See also Van Scoten v. Commonwealth of Pennsylvania,* 404 F.2d 767 (3rd Cir. 1968). *Word v. North Carolina, supra,* is not.

However, as set forth above, George is not in actual or constructive custody in California because of the North Carolina judgment and Warden Nelson is not an appropriate party respondent. A North Carolina official who can defend that state's conviction is an indispensable party and such an official has not been brought before the California court. This Court has clearly indicated that the Great Writ cannot be issued outside the territorial confines of the district court. See, *e.g., Carbo v. United States,* 364 U.S. 611,

618 (1961) differentiating between a writ of habeas corpus *ad prosequendum* and the Great Writ. The District Court therefore does not have jurisdiction to proceed in this matter.

The filing of a detainer similarly cannot change that conclusion. In this connection this Court's decision in *Sweeney v. Woodall,* 344 U.S. 86 (1952), involving extradition, is analogous to and controlling of the proposition that attack may not be made of an underlying conviction of a sister state when attacking either an extradition warrant or detainer. In the *Sweeney* decision an Alabama fugitive from prison sought to prevent his rendition to Alabama by bringing a petition for writ of habeas corpus in the asylum state of Ohio. The respondent charged that during his confinement in Alabama he had been brutally mistreated, and that he would be subjected to such mistreatment and worse if returned to Alabama. In its decision, the Supreme Court stated that the question to be decided was as follows:

> "In the present case, as in the others, a fugitive from justice has asked the federal court in his asylum state to pass upon the constitutionality of his incarceration in the demanding state, although the demanding state is not a party before the federal court and although he has made no attempt to raise such a question in the demanding state. The question is whether, under these circumstances, the district court should entertain the fugitive's application on its merits." *Sweeney v. Woodall, supra,* at 88-89.

In thereafter holding that the respondent was not entitled to relief, the Court stated:

> "Respondent makes no showing that relief is unavailable to him in the courts of Alabama. Had he never eluded the custody of his former jailers he certainly would be entitled to no privilege permitting him to

attack Alabama's penal process by an action brought outside the territorial confines of Alabama in a forum where there would be no one to appear and answer for that State. Indeed, as a prisoner of Alabama, under the provisions of 28 U.S.C. § 2254, and under the doctrine of *Ex parte Hawk, supra,* he would have been required to exhaust all available remedies in the state courts before making any application to the federal courts sitting in Alabama.

"By resort to a form of 'self help,' respondent has changed his status from that of a prisoner of Alabama to that of a fugitive from Alabama. But this should not effect the authority of the Alabama courts to determine the validity of his imprisonment in Alabama. The scheme of interstate rendition, as set forth in both the Constitution and the statutes which Congress has enacted to implement the Constitution, contemplates the prompt return of a fugitive from justice as soon as the state from which he fled demands him; these provisions do not contemplate an appearance by Alabama in respondent's asylum to defend against the claimed abuses of its prison system. Considerations fundamental to our federal system require that the prisoner test the claimed unconstitutionality of his treatment by Alabama in the courts of that State. Respondent should be required to initiate his suit in the courts of Alabama, where all parties may be heard, where all pertinent testimony will be readily available and where suitable relief, if any is necessary, may be fashioned." *Sweeney v. Woodall, supra,* 89-90.

Similar considerations of comity and practicality prevail here. Thus, to date North Carolina is not a party to this litigation. Its officials are not within the jurisdiction of the Court and it is highly questionable whether any judgment rendered in California would be binding upon them. Cer-

tainly traditional rules of exhaustion cannot be applied by a decision such as that rendered in the Ninth Circuit in the present case.

Moreover, assuming *arguendo* that a member of the North Carolina Attorney General's staff would voluntarily defend the North Carolina judgment in California, the burden of having to transport court records and/or evidentiary witnesses across country is clear even assuming that it would be practically possible to do so. Transfer to North Carolina pursuant to Title 28, United States Code section 1404(a) is highly questionable, if for no other reason than that statute clearly provides that a civil action may be transferred to "any other district or division where it might have been brought." While the *Word* case alone holds that George might have brought suit in North Carolina that decision itself clearly raises grave legal and practical problems.

CONCLUSION

The opinion of the Court of Appeals in this case places an intolerable burden on the Warden of San Quentin Prison in that it requires him to act as agent for other states to defend convictions in which he has no interest. He is not a proper party respondent and the District Court of California does not have jurisdiction over the North Carolina authorities. Accordingly, there is no way in which the Northern District Court of California can give effect to any order which it might issue.

The decision of *Peyton v. Rowe,* does not require the outcome decided by the Ninth Circuit in this case, nor, indeed, does it require the outcome of the decision rendered by the Fourth Circuit in *Word.* Because this case represents a significant issue in the procedure and jurisdiction of habeas

corpus cases, and involves both state and federal prisoners, we respectfully urge that the writ of certiorari be granted.

Dated September 12, 1969.

THOMAS C. LYNCH
Attorney General of the State of California

EDWARD P. O'BRIEN
Deputy Attorney General

LOUISE H. RENNE (MRS.)
Deputy Attorney General
6000 State Building
San Francisco, California 94102
Telephone: (415) 557-1337

Attorneys for Petitioner Nelson

(Appendices Follow)

Appendix A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 22,851

JOHN EDWARD GEORGE,
Appellant,

vs.

LEWIS S. NELSON, Warden, California State Prison, San Quentin; and Warden of North Carolina State Prison,
Appellees.

[May 9, 1969]

Appeal from the United States District Court for the Northern District of California

---

Before: Hamley, Hamlin and Koelsch, Circuit Judges

Hamley, Circuit Judge:

John Edward George, in custody at California State Prison, San Quentin, appeals from a district court order denying his application for a writ of habeas corpus.

On April 27, 1964, George was convicted in a California state court, on a plea of guilty, of robbery in the first degree and began serving his sentence of five years to life at San Quentin. On July 20, 1966, George was released to North Carolina authorities to stand trial in that state upon a North Carolina robbery charge. This was done pursuant to California Penal Code section 1389 (1963), and North Carolina G.S. § 148-89, known as the interstate "Agreement on Detainers."

George was tried in Gaston County, North Carolina, on February 8, 1967, and was convicted on the North Carolina

charge. He was sentenced to imprisonment for from twelve to fifteen years. The conviction was thereafter affirmed. *State v. George,* 271 N.C. 438, 156 S.E. 2d 845.

However, George did not begin service of the North Carolina sentence. He was returned to San Quentin to complete service of his California sentence after which he is to serve his North Carolina sentence. On April 14, 1967, North Carolina authorities wrote to San Quentin, placing a detainer on George so that he would in due course be returned to North Carolina for this purpose.

In his habeas corpus application thereafter filed in the United States District Court for the Northern District of California, George did not attack his California conviction, but rather challenged the North Carolina conviction. He alleged, in effect, that: (1) in the North Carolina prosecution he was not tried within the period permissible under the California and North Carolina detainer statutes, and the North Carolina court was therefore without jurisdiction, this constituting a denial of due process; (2) he was denied his constitutional right to a speedy trial in North Carolina; and (3) he was convicted on testimony known by North Carolina prosecuting officials to be perjured.[1] George asserted in his application that he wanted the validity of the North Carolina conviction determined now because it, together with the North Carolina detainer, adversely affects favorable consideration of parole and reduced custodial classification by California authorities.

On March 1 and 20, 1968, the district court denied the application for a writ on the ground that *McNally v. Hill,* 293 U.S. 131, foreclosed habeas corpus relief on the North Caro-

1. George alleged that he presented the first two of these grounds for relief in his direct appeal in North Carolina. He did not allege in his application that he presented the perjury ground in any North Carolina state court proceeding.

lina conviction while George was still in custody under the prior California judgment. George appealed to this court on April 3, 1968.

On May 20, 1968, the United States Supreme Court in *Peyton v. Rowe*, 391 U.S. 54, overruled *McNally v. Hill*. The Supreme Court held that a prisoner serving consecutive sentences is "in custody" under any one of them for purposes of 28 U.S.C. § 2241(c)(3) (1964), and may, in a federal habeas corpus proceeding thereunder, challenge the constitutionality of a sentence scheduled for future service.

George then moved in this court for an order remanding the cause to the district court for further proceedings in the light of *Peyton v. Rowe*. In a supplemental brief thereafter filed George in effect asserted, as an additional reason why the validity of the North Carolina conviction should be determined at this time, that a delay in making this determination will lessen the chance that substantial justice will be done with regard to the North Carolina conviction.[2]

The California warden opposed the motion to remand, arguing that he is not a proper party insofar as George is challenging the North Carolina conviction, and that an appropriate North Carolina party is an indispensable party.[3] The California warden further argued that the United States District Court for the Northern District of California did not have jurisdiction to entertain this habeas proceeding. We passed consideration of the motion to the hearing of the appeal on the merits.

---

2. George thereby invoked the reasons stated in *Peyton v. Rowe*, 391 U.S. 54, 62, 64 (the dimming of memories, death of witnesses, and incarceration when entitled to release) why habeas applicants are entitled to attack all outstanding convictions without delay.

3. While George named the "Warden, North Carolina State Prison (Name Unknown)" as a respondent in his amended application in this habeas corpus proceeding, there is nothing in the record before us to indicate that process has been served upon the North Carolina warden.

In *Peyton v. Rowe,* the consecutive or successive sentences were imposed by the same sovereign. Here the first sentence was imposed against George by a California court, and the second was imposed by a North Carolina court. However, the rule established in *Rowe* that a federal habeas applicant may attack the validity of a second sentence without awaiting completion of service of the first sentence, applies even though the two sentences were imposed by different sovereigns. *Word v. North Carolina,* 4 Cir., 406 F.2d 352, 355; *United States ex rel. Van Scoten v. Commonwealth of Pennsylvania,* 3 Cir., 404 F.2d 767, 768.

This brings us to the question of whether, under the circumstances of this case, a habeas proceeding should be entertained in the district of confinement (California) or in the district of sentencing (North Carolina).

Since George is in state custody in the Northern District of California, we think that district court has jurisdiction to entertain the habeas application. Title 28 U.S.C. § 2241(a) provides that writs of habeas corpus may be granted by the district courts "within their respective jurisdictions." In *Ahrens v. Clark,* 335 U.S. 188, the Supreme Court held that this phrase means the district in which the petitioner is detained or confined when the petition is filed.[4] See also, *Ashley v. Washington,* 9 Cir., 394 F.2d 125, 126.

It is also our view that, while the challenged judgment is that of North Carolina, the California warden is a proper respondent. He is the actual custodian of George by reason of the California conviction and also as agent of the North Carolina warden, as evidenced by the detainer. If the California warden does not wish to defend the North Carolina

---

4. As observed by the Fourth Circuit in *Word v. North Carolina,* 406 F.2d 352, this rule of *Ahrens* has been departed from in the case of applicants resident outside of the United States, and perhaps in certain other exceptional circumstances.

conviction he can call upon the authorities of North Carolina to provide that defense.

In holding that the California district court has jurisdiction, we have not overlooked the fact that the Fourth Circuit, in *Word v. North Carolina*, 4 Cir., 406 F.2d 352, has reached a contrary result. The *Word* court affirmed the dismissal of two habeas applications filed in a Virginia district court by Virginia prisoners challenging North Carolina convictions. In doing so, however, the Fourth Circuit did not seem to announce a categorical rule that a district court in the district of custody could never assume jurisdiction. Instead, it said ". . . . the latter, where permissible [is] infrequently preferable."

We recognize that, under the law of the Fourth Circuit, as established in the *Word* decision, a federal district court in North Carolina could have entertained George's application. It was there held that a North Carolina district court should not have dismissed, on jurisdictional grounds, the habeas application of a Virginia prisoner who sought to set aside a North Carolina conviction.[5] But the problem before us is not whether a district court in North Carolina could have entertained George's application, but whether the district court in California, where the application was filed, had jurisdiction. We do not now pass upon the question of whether the California district court may, after this remand, transfer the cause to the North Carolina district court pursuant to 28 U.S.C. § 1404(a) (1964).

---

5. The rule is to the contrary in the Ninth Circuit. In *Ashley v. Washington*, 9 Cir., 394 F.2d 125, this court held that a state prisoner in Florida custody under a Florida judgment, faced with a detainer filed by the State of Washington, could not challenge the Washington conviction upon which the detainer was based, in a habeas proceeding brought in a Washington district court. To like effect, see *Van Scoten v. Commonwealth of Pennsylvania*, 3 Cir., 404 F.2d 767.

It cannot be denied that the entertaining of such proceedings in the state of confinement rather than the state where the challenged conviction was obtained presents practical problems. But, likewise, a rule requiring the prisoner to seek relief in the latter state presents practical problems. They are discussed at some length in the opinions filed in *Word v. North Carolina*. We do not see how a disposition of this appeal can avoid one set of problems or the other. Perhaps new judicially or legislatively-fashioned techniques are needed to meet these problems, now that *Peyton v. Rowe* has assured state prisoners an immediate right to attack convictions not yet being served. But all that is presented to us at this time are the questions of California district court jurisdiction and indispensability of parties.

Reversed and remanded for further proceedings.

Appendix B

Filed—Jan. 10, 1968
James P. Welsh, Clerk

In the United States District Court
Northern District of California

No. 48344

JOHN EDWARD GEORGE,
Petitioner,

vs.

STATE OF NORTH CAROLINA,
Respondent.

ORDER

Petitioner, an inmate at San Quentin Prison, has filed this petition for writ of habeas corpus attacking his conviction by the State of North Carolina.

From the face of the petition it is apparent that the petitioner has failed to name the proper party respondent as required by 28 U.S.C. § 2242, for the person in whose custody he is confined is not designated. See *Mihailoviki v. State of California,* 364 F.2d 808 (9th Cir. 1966); *Morehead v. State of California,* 339 F.2d 170 (9th Cir. 1964).

Accordingly, this petition for writ of habeas corpus is DENIED, with leave to amend by naming the proper party respondent.

Dated: January 10, 1968.

/s/ GEO. B. HARRIS
United States District Judge

Appendix C

Filed—Mar. 1, 1968
James P. Welsh, Clerk

In the United States District Court
Northern District of California

No. 48344

JOHN EDWARD GEORGE,
Petitioner,

vs.

L. S. NELSON, Warden, San Quentin Prison,
Respondent.

ORDER

By order of this Court dated January 10, 1968, petitioner's application for writ of habeas corpus was denied for failure to name the proper party respondent. This deficiency has now been corrected.

Petitioner, while imprisoned at San Quentin Prison pursuant to a valid California judgment, was transferred to North Carolina to stand trial on a charge of armed robbery. He was convicted and returned to San Quentin. He now seeks to attack his North Carolina conviction.

Although his petition does not so state, it is assumed that the petitioner is serving concurrent sentences on the California and North Carolina convictions. Thus, he would not be entitled to release from detention, even if his North Carolina conviction were held to be illegal. This is a fatal defect. *McNally v. Hill,* 293 U.S. 131.

Accordingly, this petition for writ of habeas corpus must be, and hereby is, Denied.

Dated: March 1, 1968.

/s/ GEO. B. HARRIS
United States District Judge

Appendix D

Filed—Mar. 21, 1968
James P. Welsh, Clerk

In the United States District Court
Northern District of California

No. 48344

JOHN EDWARD GEORGE,
Petitioner,

vs.

L. S. NELSON, Warden, San Quentin Prison,
Respondent.

ORDER

By order of this Court dated March 1, 1968, petitioner's application for writ of habeas corpus was denied. The Court, relying on *McNally v. Hill,* 293 U.S. 131, held that inquiry into the petitioner's North Carolina conviction was barred because he was concurrently serving a sentence pursuant to a valid California judgment.

Petitioner now seeks a rehearing. He argues that *McNally* is not applicable to his case because he will not begin serving his North Carolina sentence until completion of his California sentence. The *McNally* rule, however, is equally applicable to the situation where the sentence imposed pursuant to the conviction under attack is to be served after, rather than concurrently, with the valid sentence.

Accordingly, this motion for a rehearing must be, and hereby is, denied.

Dated: March 20, 1968.

/s/ GEO. B. HARRIS
United States District Judge

Appendix E

UNITED STATES CODE

Title 28

28 U.S.C. § 1254(1) (1964), 62 Stat. 928 (1948)

§ 1254. Courts of appeals; certiorari; appeal; certified questions.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

28 U.S.C. § 1404(a) (1964), 62 Stat. 937 (1948)

§ 1404. Change of Venue.

(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

28 U.S.C. § 2241(c)(3) (1964), 63 Stat. 105 (1949)

§ 2241. Power to grant writ.

(c) The writ of habeas corpus shall not extend to a prisoner unless—

• • • • • • •

(3) He is in custody in violation of the Constitution or laws or treaties of the United States.

CALIFORNIA PENAL CODE

Chapter 8.5. Agreement on Detainers [New]

§ 1389. Disposal of detainers against prisoner based on untried charges, etc.

The agreement on detainers is hereby enacted into law and entered into by this State with all other jurisdictions legally joining therein in the form substantially as follows:

The Agreement on Detainers.

The contracting states solemnly agree that:

Article I

The party states find that charges outstanding against a prisoner, detainers based on untried indictments, informations or complaints, and difficulties in securing speedy trial of persons already incarcerated in other jurisdictions, produce uncertainties which obstruct programs of prisoner treatment and rehabilitation. Accordingly, it is the policy of the party states and the purpose of this agreement to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers based on untried indictments, informations or complaints. The party states also find that proceedings with reference to such charges and detainers, when emanating from another jurisdiction, cannot properly be had in the absence of cooperative procedures. It is the further purpose of this agreement to provide such cooperative procedures.

Article II

As used in this agreement:

(a) "State" shall mean a state of the United States; the United States of America; a territory or possession of the United States; the District of Columbia; the Commonwealth of Puerto Rico.

(b) "Sending state" shall mean a state in which a prisoner is incarcerated at the time that he initiates a request for final disposition pursuant to Article III hereof or at the time that a request for custody or availability is initiated pursuant to Article IV hereof.

(c) "Receiving state" shall mean the state in which trial is to be had on an indictment, information or complaint pursuant to Article III or Article IV hereof.

Article III

(a) Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party state, and whenever during the continuance of the term of imprisonment there is pending in any other party state any untried indictment, information or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within one hundred eighty days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information or complaint: provided that for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance. The request of the prisoner shall be accompanied by a certificate of the appropriate official having custody of the prisoner, stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the state parole agency relating to the prisoner.

(b) The written notice and request for final disposition referred to in paragraph (a) hereof shall be given or sent by the prisoner to the warden, commissioner of corrections or other official having custody of him, who shall promptly forward it together with the certificate to the appropriate prosecuting official and court by registered or certified mail, return receipt requested.

(c) The warden, commissioner of corrections or other official having custody of the prisoner shall promptly inform him of the source and contents of any detainer lodged

against him and shall also inform him of his right to make a request for final disposition of the indictment, information or complaint on which the detainer is based.

(d) Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall operate as a request for final disposition of all untried indictments, informations or complaints on the basis of which detainers have been lodged against the prisoner from the state to whose prosecuting official the request for final disposition is specifically directed. The warden, commissioner of corrections or other official having custody of the prisoner shall forthwith notify all appropriate prosecuting officers and courts in the several jurisdictions within the state to which the prisoner's request for final disposition is being sent of the proceeding being initiated by the prisoner. Any notification sent pursuant to this paragraph shall be accompanied by copies of the prisoner's written notice, request, and the certificate. If trial is not had on any indictment, information or complaint contemplated hereby prior to the return of the prisoner to the original place of imprisonment, such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

(e) Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall also be deemed to be a waiver of extradition with respect to any charge or proceeding contemplated thereby or included therein by reason of paragraph (d) hereof, and a waiver of extradition to the receiving state to serve any sentence there imposed upon him, after completion of his term of imprisonment in the sending state. The request for final disposition shall also

constitute a consent by the prisoner to the production of his body in any court where his presence may be required in order to effectuate the purposes of this agreement and a further consent voluntarily to be returned to the original place of imprisonment in accordance with the provisions of this agreement. Nothing in this paragraph shall prevent the imposition of a concurrent sentence if otherwise permitted by law.

(f) Escape from custody by the prisoner subsequent to his execution of the request for final disposition referred to in paragraph (a) hereof shall void the request.

Article IV

(a) The appropriate officer of the jurisdiction in which an untried indictment, information or complaint is pending shall be entitled to have a prisoner against whom he has lodged a detainer and who is serving a term of imprisonment in any party state made available in accordance with Article V (a) hereof upon presentation of a written request for temporary custody or availability to the appropriate authorities of the state in which the prisoner is incarcerated: provided that the court having jurisdiction of such indictment, information or complaint shall have duly approved, recorded and transmitted the request: and provided further that there shall be a period of thirty days after receipt by the appropriate authorities before the request be honored, within which period the governor of the sending state may disapprove the request for temporary custody or availability, either upon his own motion or upon motion of the prisoner.

(b) Upon receipt of the officer's written request as provided in paragraph (a) hereof, the appropriate authorities having the prisoner in custody shall furnish the officer with a certificate stating the term of commitment under which

the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the state parole agency relating to the prisoner. Said authorities simultaneously shall furnish all other officers and appropriate courts in the receiving state who have lodged detainers against the prisoner with similar certificates and with notices informing them of the request for custody or availability and of the reasons therefor.

(c) In respect of any proceeding made possible by this Article, trial shall be commenced within one hundred twenty days of the arrival of the prisoner in the receiving state, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.

(d) Nothing contained in this Article shall be construed to deprive any prisoner of any right which he may have to contest the legality of his delivery as provided in paragraph (a) hereof, but such delivery may not be opposed or denied on the ground that the executive authority of the sending state has not affirmatively consented to or ordered such delivery.

(e) If trial is not had on any indictment, information or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to Article V(e) hereof, such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

Article V

(a) In response to a request made under Article III or Article IV hereof, the appropriate authority in a sending state shall offer to deliver temporary custody of such prisoner to the appropriate authority in the state where such indictment, information or complaint is pending against such person in order that speedy and efficient prosecution may be had. If the request for final disposition is made by the prisoner, the offer of temporary custody shall accompany the written notice provided for in Article III of this agreement. In the case of a federal prisoner, the appropriate authority in the receiving state shall be entitled to temporary custody as provided by this agreement or to the prisoner's presence in federal custody at the place for trial, whichever custodial arrangement may be approved by the custodian.

(b) The officer or other representative of a state accepting an offer of temporary custody shall present the following upon demand:

(1) Proper identification and evidence of his authority to act for the state into whose temporary custody the prisoner is to be given.

(2) A duly certified copy of the indictment, information or complaint on the basis of which the detainer has been lodged and on the basis of which the request for temporary custody of the prisoner has been made.

(c) If the appropriate authority shall refuse or fail to accept temporary custody of said person, or in the event that an action on the indictment, information or complaint on the basis of which the detainer has been lodged is not brought to trial within the period provided in Article III or Article IV hereof, the appropriate court of the jurisdiction where the indictment, information or complaint has

been pending shall enter an order dismissing the same with prejudice, and any detainer based thereon shall cease to be of any force or effect.

(d) The temporary custody referred to in this agreement shall be only for the purpose of permitting prosecution on the charge or charges contained in one or more untried indictments, informations or complaints which form the basis of the detainer or detainers or for prosecution on any other charge or charges arising out of the same transaction. Except for his attendance at court and while being transported to or from any place at which his presence may be required, the prisoner shall be held in a suitable jail or other facility regularly used for persons awaiting prosecution.

(e) At the earliest practicable time consonant with the purposes of this agreement, the prisoner shall be returned to the sending state.

(f) During the continuance of temporary custody or while the prisoner is otherwise being made available for trial as required by this agreement, time being served on the sentence shall continue to run but good time shall be earned by the prisoner only if, and to the extent that, the law and practice of the jurisdiction which imposed the sentence may allow.

(g) For all purposes other than that for which temporary custody as provided in this agreement is exercised, the prisoner shall be deemed to remain in the custody of and subject to the jurisdiction of the sending state and any escape from temporary custody may be dealt with in the same manner as an escape from the original place of imprisonment or in any other manner permitted by law.

(h) From the time that a party state receives custody of a prisoner pursuant to this agreement until such prisoner is

returned to the territory and custody of the sending state, the state in which the one or more untried indictments, informations or complaints are pending or in which trial is being had shall be responsible for the prisoner and shall also pay all costs of transporting, caring for, keeping and returning the prisoner. The provisions of this paragraph shall govern unless the states concerned shall have entered into a supplementary agreement providing for a different allocation of costs and responsibilities as between or among themselves. Nothing herein contained shall be construed to alter or affect any internal relationship among the departments, agencies and officers of and in the government of a party state, or between a party state and its subdivisions, as to the payment of costs, or responsibilities therefor.

Article VI

(a) In determining the duration and expiration dates of the time periods provided in Articles III and IV of this agreement, the running of said time periods shall be tolled whenever and for as long as the prisoner is unable to stand trial, as determined by the court having jurisdiction of the matter.

(b) No provision of this agreement, and no remedy made available by this agreement, shall apply to any person who is adjudged to be mentally ill.

Article VII

Each state party to this agreement shall designate an officer who, acting jointly with like officers of other party states, shall promulgate rules and regulations to carry out more effectively the terms and provisions of this agreement, and who shall provide, within and without the state, information necessary to the effective operation of this agreement.

Article VIII

This agreement shall enter into full force and effect as to a party state when such state has enacted the same into law. A state party to this agreement may withdraw herefrom by enacting a statute repealing the same. However, the withdrawal of any state shall not affect the status of any proceedings already initiated by inmates or by state officers at the time such withdrawal takes effect, nor shall it affect their rights in respect thereof.

Article IX

This agreement shall be liberally construed so as to effectuate its purposes. The provisions of this agreement shall be severable and if any phrase, clause, sentence or provision of this agreement is declared to be contrary to the constitution of any party state or of the United States or the applicability thereof to any government, agency, person or circumstance is held invalid, the validity of the remainder of this agreement and the applicability thereof to any government, agency, person or circumstance shall not be affected thereby. If this agreement shall be held contrary to the constitution of any state party hereto, the agreement shall remain in full force and effect as to the remaining states and in full force and effect as to the state affected as to all severable matters. (Added Stats.1963, c. 2115, p. 4394, § 1.)

§ 1389.1 Appropriate court

The phrase "appropriate court" as used in the agreement on detainers shall, with reference to the courts of this State, means the court in which the indictment, information, or complaint is filed. (Added Stats.1963, c. 2115, p. 4394, § 1).

§ 1389.2 Enforcement; co-operation

All courts, departments, agencies, officers, and employees of this State and its political subdivisions are hereby directed to enforce the agreement on detainer and to co-operate with one another and with other states in enforcing the agreement and effectuating its purpose. (Added Stats. 1963, c. 2115, p. 4394, § 1.)

§ 1389.3 Habitual criminals; application of act

Nothing in this chapter or in the agreement on detainers shall be construed to require the application of Section 644 to any person on account of any conviction had in a proceeding brought to final disposition by reason of the use of said agreement. (Added Stats.1963, c. 2115, p. 4394, § 1.)

§ 1389.4 Escapes

Every person who has been imprisoned in a prison or institution in this State and who escapes while in the custody of an officer of this or another state in another state pursuant to the agreement on detainers is deemed to have violated Section 4530 and is punishable as provided therein. (Added Stats.1963, c. 2115, p. 4394, § 1.)

§ 1389.5 Surrender of inmates

It shall be lawful and mandatory upon the warden or other official in charge of a penal or correctional institution in this State to give over the person of any inmate thereof whenever so required by the operation of the agreement on detainer. Such official shall inform such inmate of his rights provided in paragraph (a) of Article IV of the Agreement on Detainers in Section 1389 of this code. (Added Stats.1963, c. 2115, p. 4394, § 1.)

§ 1389.6 Administration

The Administrator, Interstate Probation and Parole Compacts, shall administer this agreement. (Added Stats.1963, c. 2115, p. 4394, § 1.)

§ 1389.7 Sentence concurrent with that of other jurisdiction; term-fixing and parole functions

When, pursuant to the Agreement on Detainers, a person in actual confinement under sentence of another jurisdiction is brought before a California court and sentenced by the judge to serve a California sentence concurrently with the sentence of the other jurisdiction, the Adult Authority and the California Women's Board of Terms and Parole, and the panels and members thereof, may meet in such other jurisdiction, or enter into cooperative arrangements with corresponding agencies in the other jurisdiction, as necessary to carry out the term-fixing and parole functions. (Added Stats.1963, c. 2115, p. 4394, § 1, as amended Stats. 1965, c. 238, p. 1215, § 1.)

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 595

LOUIS S. NELSON, WARDEN, SAN QUENTIN PRISON,
Petitioner,

vs.

JOHN EDWARD GEORGE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief for the Petitioner

THOMAS C. LYNCH
Attorney General of the State of California
ALBERT W. HARRIS, JR.
Assistant Attorney General
EDWARD P. O'BRIEN
Deputy Attorney General
LOUISE H. RENNE (MRS.)
Deputy Attorney General
6000 State Building
San Francisco, California 94102
Telephone: (415) 557-1337
Attorneys for Petitioner

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

Cases

STATUTES

MISCELLANEOUS AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 595

LOUIS S. NELSON, WARDEN, SAN QUENTIN PRISON,
Petitioner,

vs.

JOHN EDWARD GEORGE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief for the Petitioner

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 410 F.2d 1179 (9th Cir. 1969). It is also set forth in its entirety in the Appendix at pages 56-61.

The opinions of the United States District Court for the Northern District of California are not officially reported, but are set forth in their entirety in the Appendix at pages 4, 24, and 28, respectively.

JURISDICTION

Jurisdiction is conferred on this Court by Title 28, United States Code, section 1254(1).

The judgment of the United States Court of Appeals was filed on May 9, 1969. A timely petition for rehearing was filed on May 23, 1969, and denied on June 18, 1969.

On September 15, 1969, a petition for writ of certiorari was filed in this Court. The petition for writ of certiorari was granted on December 8, 1969, in No. 595, October Term 1969.

QUESTIONS PRESENTED

The Court of Appeal for the Ninth Circuit has held that a California state prisoner may bring a habeas corpus action in the District Court for the Northern District of California in order to challenge the constitutionality of a North Carolina sentence which he is to serve later. The Court has held that the California warden is the proper party respondent to defend such an action. The questions presented by this case are:

1) Whether the respondent George is "in custody" under the North Carolina judgment in order to render habeas corpus relief available under the decision in *Peyton v. Rowe,* 391 U.S. 54 (1968).
2) Whether the California warden is a proper party respondent to defend the North Carolina conviction since it has been given no effect in California.
3) Whether the Court of Appeals correctly determined that the District Court for the Northern District of California has jurisdiction to inquire into the validity of the North Carolina conviction.

STATUTES INVOLVED

This case involves interpretation of the federal Habeas Corpus Act, Title 28, United States Code sections 2241 et seq. The pertinent provisions are set forth in Appendix A to our brief.

STATEMENT OF THE CASE

Introduction

This case has arisen since the decision in *Peyton v. Rowe,* 391 U.S. 54 (1968) overruling *McNally v. Hill,* 293 U.S. 131 (1934) and holding that a state prisoner serving consecutive sentences is "in custody" under any one of them under Title 28, United States Code section 2241(c)(3). In *Peyton v. Rowe, supra,* the consecutive sentences were imposed by the same state. The questions posed by this case arise because separate sentences have been imposed by separate sovereign states.

The facts and proceedings with respect to this case are as follows:

A. Proceedings in the State Courts.

On April 27, 1964, John Edward George, the petitioner for writ of habeas corpus below, and respondent in this Court, was convicted in the San Francisco Superior Court of a violation of California Penal Code section 211 (robbery in the first degree). *People v. John Edward George,* No. 62815. He was sentenced to state prison for the term prescribed by law. Under section 213, California Penal Code, the sentence for first degree robbery is an indeterminate five years to life sentence. (A. 30-32).

Following his conviction detainers were filed in California by the states of Kansas, Nevada, and North Carolina on June 4, 10 and 11, 1964, respectively. (A. 32, 42-55).

On or about July 20, 1966, pursuant to California Penal Code section 1389 ("The Agreement on Detainers") and at his request, George was released to North Carolina to stand trial in that state upon a North Carolina robbery charge which underlay the detainer (A. 8, 56). His conviction in North Carolina was subsequently affirmed by the North Carolina Supreme Court in *State v. George,* 271

N.C. 438, 156 S.E.2d 845 (1967). Apparently certiorari in this Court was not sought. George then was returned to California to complete his California sentence, and as he alleged below, service on his North Carolina sentence will not begin until he returns to North Carolina (A. 25-26).

B. Proceedings in the Federal Courts.

1. PROCEEDINGS IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA.

On December 7, 1967, George filed a petition for writ of habeas corpus in the United States District Court, Northern District of California, in an action entitled "John Edward George v. State of North Carolina" in which he challenged only his North Carolina conviction. On January 10, 1968, the District Court denied the petition with leave to amend on the ground that George had failed to name a proper party respondent (A. 4).

Thereafter, on February 26, 1968, George amended his petition and in an action entitled "John Edward George v. L. S. Nelson, Warden, San Quentin State Prison (in the capacity as Agent for State of North Carolina) and Warden, North Carolina State Prison (Name Unknown)" again brought suit in the District Court challenging his North Carolina conviction. (A. 5-23). He alleged that he was not tried in North Carolina within the period of time permissible under the Agreement on Detainers. Accordingly, he urged that the North Carolina court was without jurisdiction to proceed, and that he was denied his constitutional right to a speedy trial in North Carolina. He also alleged that he was convicted on the basis of known perjured testimony.[1] On March 1, 1968, the Court again denied

1. The Ninth Circuit noted (A-57) that George alleged that he presented the first two of these grounds for relief (lack of jurisdiction and denial of right to speedy trial) in his direct appeal in North Carolina. He did not allege in his application that he presented the perjury ground in any North Carolina state court proceeding.

the petition on the ground that in the absence of a specific allegation, it was assumed that George was serving concurrent sentences on the California and North Carolina convictions. Since George would not be entitled to release even if his North Carolina conviction was held to be illegal, the Court held that *McNally v. Hill*, 293 U.S. 131 (1934) required denial of the petition (A. 24).

On March 15, 1968, George filed a petition for rehearing on the ground that commencement of service on the North Carolina sentence would not begin until he was in "actual custody" of the North Carolina Prison authorities. He stated that the effect of the North Carolina sentence was therefore consecutive, and that *McNally v. Hill, supra*, did not apply (A. 25-27).

On March 21, 1968, the District Court denied the motion for rehearing, holding that the "*McNally* rule is equally applicable to the situation when the sentence imposed pursuant to the conviction under attack is to be served after, rather than concurrently, with the valid sentence." (A. 28).

On April 25, 1968, the Court ordered that the motion for certificate of probable cause be granted (A. 3).

2. PROCEEDINGS IN THE COURT OF APPEALS FOR THE NINTH CIRCUIT.

On or about June 13, 1968, and prior to the filing of an opening brief in the Court of Appeals, George filed a motion to remand the proceedings to the district court. He based his motion upon the ground that *Peyton v. Rowe, supra*, had recently been decided overruling *McNally v. Hill, supra*, and that that decision had held that a prisoner serving consecutive sentences is "in custody" under any one of them under Title 28, United States Code section 2241(c)(3).

Accordingly, he argued that *Peyton v. Rowe, supra,* required that his case be remanded to the District Court in order to have the merits of his alleged federal claims adjudicated (A. 58).

On July 1, 1968, the named respondent below, Warden Nelson of San Quentin Prison, filed an "Opposition to 'Motion to Remand to District Court' and Motion to Dismiss Appeal" (A.1). This was the first appearance made by the Warden. He opposed the motion to remand and urged that he was not a proper party respondent to defend the North Carolina conviction and that an appropriate North Carolina party was an indispensable party. He also argued that the District Court for the Northern District of California did not have jurisdiction to inquire into the validity of the North Carolina conviction (A. 58-59).

The Court of Appeals by order dated July 12, 1968, passed the matter to a hearing on the merits (A. 1). After a closing brief was filed by George on or about July 22, 1968, petitioner Nelson filed an Answering Brief. After the appointment of counsel for George, a "Petitioner-Appellant's Reply Brief" was filed by counsel on his behalf, urging that Warden Nelson was a proper party respondent to defend the North Carolina conviction and that the California District Court had jurisdiction to inquire into its validity (A. 2).

Oral argument was held on February 28, 1969 (A. 2). At the argument, counsel for the Warden attempted to show the current status with respect to the detainers filed by Kansas and Nevada (*supra,* 3), and that, according to California practice, detainers were honored according to the chronological order in which they were received. The Court stated it would consider these matters only if counsel for George so stipulated. He did not (A. 42-55).

Thereafter, on May 9, 1969, the Court of Appeals for the Ninth Circuit issued its opinion reversing the District Court and remanding the case to the District Court for further proceedings (A. 56-61). In reaching that decision, the Court first held that the decision in *Peyton v. Rowe* applied to this case. The Court stated (A. 59):

> "In *Peyton v. Rowe*, the consecutive or successive sentences were imposed by the same sovereign. Here the first sentence was imposed against George by a California court, and the second was imposed by a North Carolina court. However, the rule established in *Rowe* that a federal habeas applicant may attack the validity of a second sentence without awaiting completion of service of the first sentence, applies even though the two sentences were imposed by different sovereigns. *Word v. North Carolina*, 4 Cir., 406 F.2d 352, 355; *United States ex rel. Van Scoten v. Commonwealth of Pennsylvania*, 3 Cir., 404 F.2d 767, 768."

The Court then stated (A. 59):

> "This brings us to the question of whether, under the circumstances of this case, a habeas proceeding should be entertained in the district of confinement (California) or in the district of sentencing (North Carolina).
>
> "Since George is in state custody in the Northern District of California, we think that district court has jurisdiction to entertain the habeas application. Title 28 U.S.C. § 2241(a) provides that writs of habeas corpus may be granted by the district courts 'within their respective jurisdictions.' In *Ahrens v. Clark*, 335 U.S. 188, the Supreme Court held that this phrase means the district in which the petitioner is detained or confined when the petition is filed. [Footnote omitted.] See also, *Ashley v. Washington*, 9 Cir., 394 F.2d 125, 126."

The Court also stated (A. 60):

> "It is also our view that, while the challenged judgment is that of North Carolina, the California warden is a proper respondent. He is the actual custodian of George by reason of the California conviction and also as agent of the North Carolina warden, as evidenced by the detainer. If the California warden does not wish to defend the North Carolina conviction he can call upon the authorities of North Carolina to provide that defense."

In holding that the California district court as the district of confinement was the proper court in which to bring the action, the Court frankly recognized that its decision was directly contrary to the decision rendered by the Fourth Circuit in *Word v. North Carolina,* 406 F.2d 352 (4th Cir. 1969) (A. 60). The Court stated (A. 60):

> "In holding that the California district court has jurisdiction, we have not overlooked the fact that the Fourth Circuit, in *Word v. North Carolina,* 4 Cir., 406 F.2d 352, has reached a contrary result. The *Word* court affirmed the dismissal of two habeas applications filed in a Virginia district court by Virginia prisoners challenging North Carolina convictions. In doing so, however, the Fourth Circuit did not seem to announce a categorical rule that a district court in the district of custody could never assume juridiction. Instead, it said '. . . the latter, where permissible [is] infrequently preferable.'"

Finally, the Court concluded (A. 60-61):

> "We recognize that, under the law of the Fourth Circuit, as established in the *Word* decision, a federal district court in North Carolina could have entertained George's application. It was there held that a North Carolina district court should not have dismissed, on juridictional grounds, the habeas application of a Vir-

ginia prisoner who sought to set aside a North Carolina conviction. [Footnote omitted.] But the problem before us is not whether a district court in North Carolina could have entertained George's application, but whether the district court in California, where the application was filed, had jurisdiction. We do not now pass upon the question of whether the California district court may, after this remand, transfer the cause to the North Carolina district court pursuant to 28 U.S.C. § 1404(a) (1964).

"It cannot be denied that the entertaining of such proceedings in the state of confinement rather than the state where the challenged conviction was obtained presents practical problems. But, likewise, a rule requiring the prisoner to seek relief in the latter state presents practical problems. They are discussed at some length in the opinions filed in *Word v. North Carolina.* We do not see how a disposition of this appeal can avoid one set of problems or the other. Perhaps new judicially or legislatively-fashioned techniques are needed to meet these problems, now that *Peyton v. Rowe* has assured state prisoners an immediate right to attack convictions not yet being served. But all that is presented to us at this time are the questions of California district court jurisdiction and indispensability of parties."

Following the issuance of the Ninth Circuit decision, a timely petition for rehearing and suggestion for rehearing en banc was filed by petitioner (A. 2). That petition was denied on June 18, 1968 (A. 2, 62).

SUMMARY OF ARGUMENT

Title 28, United States Code section 2241(c)(3) provides that federal district courts may issue habeas corpus writs on behalf of prisoners who are "in custody in violation of the Constitution . . . of the United States." In *Peyton v.*

Rowe, 391 U.S. 54 (1968), this Court held that a state prisoner serving consecutive sentences is "in custody" under any one of them under section 2241(c)(3).

In *Peyton v. Rowe, supra,* the consecutive sentences were imposed by one sovereign state for crimes committed within that state. In the present case, sentences have been imposed by separate sovereign states, neither of which has given effect to the sentence imposed by the other. Accordingly, George is not "in custody" under the North Carolina judgment and the decision of *Peyton v. Rowe, supra,* is not applicable to the facts of this case.

Even if it could somehow be said that George is "in custody" under the North Carolina judgment, the Court of Appeals erred in holding that the California warden is a proper party respondent to defend the North Carolina judgment. George is in custody only because of the California conviction. The North Carolina judgment has been given no effect in California. There is no action which the California warden can take which will affect that judgment or bind North Carolina authorities.

The mere fact that a detainer has been filed in California by North Carolina officials does not make the California warden an agent for North Carolina. A detainer is merely a request for notice of the inmate's release and an opportunity to take him into custody upon release.

Since the California warden is not an appropriate party respondent and there has been no North Carolina official before the Court against whom a binding judgment can be taken, jurisdiction to proceed is lacking in the District Court. In holding to the contrary, the Court of Appeals has created innumerable practical difficulties which only serve to emphasize the legal error committed.

Just as this action cannot be brought in California, so, too, this action could not have been brought in North

Carolina. *Ahrens v. Clark,* 335 U.S. 188 (1948), holds that a petition for writ of habeas corpus must be brought if at all in the district of confinement. Accordingly, to the extent that the decision rendered by the Fourth Circuit in *Word v. North Carolina,* 406 F.2d 352 (4th Cir. 1969) is to the contrary, it is erroneous. The lack of appropriate forum in which to bring this action serves to make clear that *Peyton v. Rowe* does not apply to this case.

ARGUMENT

I. Since George Is Not "In Custody" Under the North Carolina Conviction, the Decision in Peyton v. Rowe, 391 U.S. 54 (1968) Does Not Apply to This Case.

Title 28, United States Code section 2241(c)(3) provides that federal district courts may issue writs of habeas corpus on behalf of prisoners who are "in custody in violation of the Constitution . . . of the United States." In *Peyton v. Rowe,* 391 U.S. 54 (1968), this Court overruled *McNally v. Hill,* 293 U.S. 131 (1934), and held that a prisoner serving consecutive sentences is "in custody" under any one of them for purposes of section 2241. Accordingly, it was held that a state prisoner could challenge the constitutionality of a consecutive sentence in a federal habeas corpus proceeding.

In *Peyton v. Rowe, supra,* the sentences to be served were imposed by one sovereign state for crimes committed within that state. Rowe had been sentenced to a 30-year term of sentence and then to a 20-year sentence for crimes arising out of the same events. As the Court noted, "[p]ractically speaking Rowe is in custody for 50 years, or for the aggregate of his 30 year sentence and 20 year sentences. For purpose of parole eligibility, under Virginia law, he is incarcerated for 50 years." *Peyton v. Rowe, supra,* at 64. The respondent Thacker similarly had been imprisoned by the same sovereign state under a number of sentences totaling more than 60 years.

In the case at bar, the facts are entirely different. Here, the sentences to be served have been imposed by separate sovereign states for separate criminal acts. Neither California, which imposed its sentence first, nor North Carolina, which imposed its sentence later, has given any effect to the conviction rendered by the other.

George is presently in custody in California solely because of his California conviction. Service on his North Carolina sentence will not begin until he is in North Carolina. When that will be is uncertain, in any case and particularly here since George is presently serving an indeterminate life sentence. As a matter of fact, it could be that George might never complete his sentence in California or begin to serve his North Carolina sentence.

For these reasons it cannot be said, that George is "in custody" under the North Carolina sentence. This conclusion must be reached where separate sentences have been imposed by different states. While it has been suggested (Opp. Cert. 10) that it is merely an "accident" that the sentences have been imposed by two different states, that suggestion misses the basic point that it is a federal system of government under which we live and that each state has a separate interest because of the commission of a crime within its borders.

Accordingly, it must be concluded that *Peyton v. Rowe, supra,* does not apply to the interstate case. That the Court itself recognized that its decision could not apply to all cases is indicated by language contained in the opinion itself. There, in describing the benefits to be achieved by *Peyton v. Rowe,* the Court stated:

> "Meaningful factual hearings on alleged constitutional deprivations can be conducted before memories and records grow stale, *and at least one class of prisoners* [emphasis supplied] will have the opportunity to

challenge defective convictions and obtain relief without having to spend unwarranted months or years in prison." *Peyton v. Rowe, supra,* 65.

II. The California Warden Is Not the Proper Party Respondent to Defend the North Carolina Conviction.

Although *Peyton v. Rowe, supra,* does not apply to this case, the Court of Appeals held to the contrary. Furthermore, in holding that George could attack his North Carolina sentence now, the Court held that the California warden was the proper party respondent to defend the North Carolina conviction. The Court stated (A. 60):

> "It is also our view that, while the challenged judgment is that of North Carolina, the California warden is a proper respondent. He is the actual custodian of George by reason of the California conviction and also as agent of the North Carolina warden, as evidenced by the detainer. If the California warden does not wish to defend the North Carolina conviction he can call upon the authorities of North Carolina to provide that defense."

The Court erred in reaching this conclusion. The California warden is custodian of George because of the California conviction and not because the State of North Carolina also convicted him.

The Court's conclusion is not required by Title 28, United States Code section 2243. That section provides that the "writ . . . shall be directed to the person having custody of the person detained." This provision reflects the long standing rule that the proper party respondent must be "some person who has immediate custody of the party detained, with the power to produce the body of such party before the court or judge. . . ." *Wales v. Whitney,* 114 U.S. 564, 574 (1885); see also, *Ex parte Endo,* 323 U.S. 238, 304-307 (1944); *Jones v. Cunningham,* 371 U.S. 236, 243-244 (1963).

Such a party has been held to be an indispensable party in order for habeas corpus relief to be granted. *King v. State of California*, 356 F.2d 950 (9th Cir. 1966); *Morehead v. State of California*, 39 F.2d 170 (9th Cir. 1964): *Roseborough v. State of California*, 322 F.2d 788 (9th Cir. 1963); *Bohm v. State of Alaska*, 320 F.2d 851 (9th Cir. 1963).

The reason for this requirement is clear. It is a recognition of the necessity that jurisdiction must be obtained over the person of one empowered to deliver the body of the petitioner if custody should be declared illegal, *Wales v. Whitney, supra.* Put in more modern terms, it is a recognition of the fact that jurisdiction must be obtained upon one who is able to take whatever other action "law and justice require." 28 U.S.C. § 2243; *Ex parte Endo*, 323 U.S. 283, 304-307 (1944); *Jones v. Cunningham*, 371 U.S. 236, 243-244 (1963).

The purpose of this rule is not served by naming the California Warden as the proper party respondent to defend the North Carolina judgment. While the California Warden is the actual custodian of George, he is the actual custodian only because of the California conviction, and not because of the North Carolina conviction. There is no interest which he has in defending the North Carolina conviction, nor is there any action he can take which will affect the North Carolina conviction.

When George requested to stand trial in North Carolina under the provisions set forth in California Penal Code section 1389, et seq. ("The Agreement on Detainers") the California authorities relinquished control and custody under the Agreement in order to permit him to do so. However, the California Warden did not assume any additional custodial obligations on behalf of North Carolina when George was received back into California custody.

This is not a case where California has given some effect to the conviction of North Carolina, as for example, by increasing punishment or classifying the defendant a habitual criminal. Thus, cases like *United States ex rel. Durocher v. La Vallee,* 330 F.2d 303, 306 (2nd Cir. 1964), *cert. denied,* 377 U.S. 998 (1964), which have permitted attack against a sister-state conviction in such circumstances are not applicable here.

Similiarly, the mere filing of a detainer by the North Carolina authorities does not render the California Warden their agent. A detainer is a request for notice of the inmate's release and an opportunity to take him into custody upon release. In California, a letter from any institution or law enforcement agency requesting that notification be given prior to the inmate's release is considered to be sufficient authority for placement of a detainer. A warrant or similar document may be accepted for the same purpose (A. 43-53). In complying with a request for notification, the California warden cannot be deemed an agent for the performance of what is essentially an administrative function. Certainly it never has been this State's position that the filing of a detainer with another state or even with the federal government, constituted those authorities our agent for the purpose of defending a California conviction.[2]

---

2. Indeed, the questionable soundness of the "agency" theory adopted by the Court was recently demonstrated in another case involving the same parties in the United States District Court for the Northern District of California, entitled *John Edward George v. Lolis S. Nelson, Warden, San Quentin State Prison and State of Kansas, Donald Foster, Agent for Same,* Case No. 51720. The Supreme Court may take judicial notice of cases pending in lower federal courts. *Brown v. Board of Education of Topeka,* 344 U.S. 1 (1952).

In that case George filed a habeas corpus petition seeking to set aside the Kansas detainer which earlier had been filed because of the untried robbery charge pending there. George urged that because he had not yet been tried in Kansas, he had been denied a

Furthermore, the questions raised in the present case do not pertain to the possible effects of a detainer. This was not the basis of the court's decision and the effect, if any, in George's case is not a matter of record.

Furthermore, even assuming that a conviction detainer has some effect, as, for example, upon custody classification, habeas corpus is generally not available to test the conditions of admittedly lawful custody. *United States* ex rel. *Shonbrun v. Commanding Officer,* 403 F.2d 371 (2nd Cir. 1968) *cert. denied,* 394 U.S. 929 (1969). If such a detainer does have any adverse effect on custody it is in light of the knowledge that the inmate is wanted in another jurisdiction and that greater motivation to escape might therefore exist. On the other hand the fact that a detainer is filed could be of beneficial effect because it might result in an earlier release date than would otherwise be the case.[3] In any vent, the possible effects of a detainer would not seem to have sufficient substantive impact to require a full review of the underlying conviction, particularly one which has already been affirmed by a state supreme court.

---

right to speedy trial. In our return to the show cause order, we showed, *inter alia,* that the detainer filed by Nevada had now been removed, and that Kansas was now a party to the Interstate Agreement on Detainers. The State of Kansas also filed a pleading setting forth that fact. Since an opportunity thus presently existed under which George could go to Kansas to stand trial if he wished, the district court dismissed the proceedings on the ground that George had failed to exhaust administrative remedies under the Agreement on Detainers.

At the time of that action, however, because of the detainers that had been filed, the California warden was called upon to defend a North Carolina judgment of conviction and an untried charge in Kansas. Neither law nor practicality requires that result.

3. For example, in a state like California where a policy of having sentences served concurrently is favored (see, *e.g., In re Stoliker,* 49 Cal.2d 75, 315 P.2d.12 (1957)), the fact that a conviction detainer has been filed might well result in an earlier parole release date than otherwise be the case. This would be particularly true if the detainer was filed by a state of the prisoner's normal residence and it was known that a long prison term awaited him there (A. 37).

III. The Court of Appeal Erred in Holding That the District Court for the Northern District of California Has Jurisdiction to Review the North Carolina Judgment.

The Court of Appeal also erred in holding that the District Court for the Northern District of California has jurisdiction to review the North Carolina judgment. An appropriate party respondent must be within the territorial jurisdiction of the reviewing court in order for federal habeas corpus relief to be granted, *Wales v. Whitney,* 114 U.S. 564 (1885); *Jones v. Biddle,* 131 F.2d 853 (8th Cir. 1942), *cert. denied,* 318 U.S. 784 (1943) and as we have shown above the California warden is not an appropriate party respondent. On the other hand, a North Carolina official who would be an appropriate respondent is not before the Court. Such an official has not been served with process, and under Rule 4(f) of the Federal Rules of Civil Procedure, proper service could not be obtained.

The decision in *Carbo v. United States,* 364 U.S. 611 (1961), makes clear that the writ of habeas corpus cannot be issued outside the territorial confines of the district court. In that case it was held that a California District Court had the power to issue a writ of habeas corpus ad prosequendum to a New York City prison official directing him to deliver the petitioner, a prisoner of that city, to California to stand trial. However, in reaching that decision the Court clearly differentiated between a writ of habeas corpus ad prosequendum and the Great Writ—habeas corpus ad subjiciendum—with which the present matter is concerned. In the latter case the Court clearly concluded that territorial limitations exist. Accordingly, without either an appropriate North Carolina official as an indispensable party before the Court, or the power to issue the writ outside its district, the District Court for the

Northern District of California is without jurisdiction to proceed.

Furthermore, merely naming the California warden as the party respondent because of the detainer filed does not give the California District Court jurisdiction which is otherwise lacking. Any judgment the Court might render therefore would not be binding upon any North Carolina official. As this Court recently pointed out in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 110 (1969):

> "The Court of Appeals was quite right in vacating the judgments against Hazeltine. It is elementary that one is not bound by a judgment *in personam* resulting from litigation in which he is not designated as a party or to which he has not been made a party by service of process. *Hansberry v. Lee*, 311 U.S. 32, 40-41 (1940). The consistent constitutional rule has been that a court has no power to adjudicate a personal claim or obligation unless it has jurisdiction over the person of the defendant. *E.g., Pennoyer v. Neff*, 95 U.S. 714 (1878); *Vanderbilt v. Vanderbilt*, 354 U.S. 416, 418 (1957).
>
> "Here, Hazeltine was not named as a party, was never served and did not formally appear at the trial. Nor was the stipulation an adequate substitute for the normal methods of obtaining jurisdiction over a person or a corporation. The stipulation represented HRI's agreement to be bound by and to be liable for the acts of its parent, but it was signed only by HRI, through its attorney, Dobbs. Hazeltine did not execute the stipulation, and Dodds, although an officer of Hazeltine, did not purport to be signing on its behalf. The trial court apparently viewed the stipulation as binding Hazeltine, as equivalent to an entry of appearance, or as consent to entry of judgment against it. The stipulation on its face, however, hardly warrants this construction, and if there were other circumstances which justified the trial court's conclusion, the findings do not reveal them."

Similarly, the filing of the detainer does not give the District Court jurisdiction to review the underlying North Carolina judgment. In this connection, *Sweeney v. Woodall,* 344 U.S. 86 (1952), and other similar cases involving extradition proceedings are analogous to, and controlling of, the proposition that an attack may not be made upon the underlying conviction of a sister-state when attacking either an extradition warrant or a detainer. In the *Sweeney* decision, an Alabama fugitive from prison sought to prevent his rendition to Alabama by bringing a petition for writ of habeas corpus in the asylum state of Ohio. The respondent charged that during his confinement in Alabama he had been brutally mistreated, and that he would be subjected to such mistreatment and worse if returned to Alabama. In its decision, the Court stated that the question to be decided was as follows:

> "In the present case, as in the others, a fugitive from justice has asked the federal court in his asylum to pass upon the constitutionality of his incarceration in the demanding state, although the demanding state is not a party before the federal court and although he has made no attempt to raise such a question in the demanding state. The question is whether, under these circumstances, the district court should entertain the fugitive's application on its merits." *Sweeney v. Woodall, supra,* at 88-89.

In thereafter holding that the respondent was not entitled to relief, the Court stated:

> "Respondent makes no showing that relief is unavailable to him in the courts of Alabama. Had he never eluded the custody of his former jailers he certainly would be entitled to no privilege permitting him to attack Alabama's penal process by an action brought outside the territorial confines of Alabama in a forum where there would be no one to appear and answer

for that State. Indeed, as a prisoner of Alabama, under the provisions of 28 U.S.C. § 2254, and under the doctrine of *Ex parte Hawk, supra,* he would have been required to exhaust all available remedies in the state courts before making any application to the federal courts sitting in Alabama.

"By resort to a form of 'self help,' respondent has changed his status from that of a prisoner of Alabama to that of a fugitive from Alabama. But this should not effect the authority of the Alabama courts to determine the validity of his imprisonment in Alabama. The scheme of interstate rendition, as set forth in both the Constitution and the statutes which Congress has enacted to implement the Constitution, contemplates the prompt return of a fugitive from justice as soon as the state from which he fled demands him; these provisions do not contemplate an appearance by Alabama in respondent's asylum to defend against the claimed abuses of its prison system. Considerations fundamental to our federal system require that the prisoner test the claimed unconstitutionality of his treatment by Alabama in the courts of that State. Respondent should be required to initiate his suit in the courts of Alabama, where all parties may be heard, where all pertinent testimony will be readily available and where suitable relief, if any is necessary, may be fashioned" [footnotes omitted]. *Sweeney v. Woodall, supra,* at 89-90.

Decisions in the lower courts similarly show that extradition proceedings are "not a means of determining the guilt or innocence of the accused," but rather that review is limited. As the Ninth Circuit stated in *Smith v. State of Idaho,* 373 F.2d 149, 155 (9th Cir. 1967), *cert. denied,* 388 U.S. 919 (1967):

"[T]here are only two inquiries relevant to the decision to issue a rendition warrant for the arrest of the accused. The first is whether the accused has been substantially charged with a crime under the laws

of the demanding state. The second is whether the person demanded is a fugitive, that is, whether he was within the demanding state at the time of the alleged offense. The first is a question of law; the second, a question of fact."

Similar considerations of comity and practicality must prevail here.

IV. The Practical Difficulties Raised by the Court's Decision Emphasize the Legal Error Committed by the Court.

The practical difficulties raised by the Court's decision emphasize the legal error committed. Indeed, it may be noted at the outset, that the difficulties raised by the present case are a catalogue of the very ills that the Congress attempted to remedy in the 1940's when, in revising the Judicial Code, it substituted 28 U.S.C. § 2255 or the motion to vacate sentence for federal habeas corpus relief for prisoners in federal custody.

These difficulties are outlined in *United States v. Hayman*, 342 U.S. 205, 210-214 (1952), wherein the Court listed the "practical problems that had arisen in the administration of the federal courts habeas corpus jurisdiction." There the Court noted, inter alia, that because habeas corpus petitions must be filed in the district of confinement, those courts which had federal prisons located within their jurisdictions were burdened with an excessive number of habeas corpus petitions. In some cases, the petitions could have been shown to be frivolous, if the court records had been available, but they were not. In cases which required an evidentiary hearing to resolve the factual issues raised, the hearings had to be held away from the "scene of the facts," and away from the homes of the witnesses or the federal officers involved.

Exactly the same practical difficulties are encountered here. At least one claim raised by George—that of knowing use of perjured testimony—would require an evidentiary hearing if habeas corpus relief were available. However, the records, the witnesses, and the officers allegedly involved are all in North Carolina. To require the records and witnesses to be transported across country, even assuming that one could legally or practically do so, is only one of very real difficulties considered by the court's decision.

Thus, the gratuitous remark made by the Court that the California warden may call upon the North Carolina authorities to defend the conviction does not insure that result. The failure of an appropriate North Carolina official to voluntarily appear in California to date is understandable in light of the practical difficulties encountered in holding a hearing in California, the fact that a California District Court judgment rendered without him would have no binding effect, and the very real possibility that a hearing now might be an exercise in futility because George might never serve his North Carolina sentence.

Finally, when the steady increase in the numbers of petitions for writs of habeas corpus which are filed each year is considered, as well as the fact that the concept of a plenary hearing has greatly expanded since the decision in *Townsend v. Sain*, 372 U.S. 293 (1963), the extent of the practical difficulties outlined in *Hayman* in 1952 seem minor by comparison.[4] These practical difficulties which are inherent in the Court's decision only serve to make clear the legal error committed.

---

4. Detainers are filed against prisoners by many different sources for a variety of reasons. They may be filed against an escapee, a parolee, or one who is to stand trial or complete his sentence. Furthermore, they may be placed one day and removed another. Accordingly, there are no statistics of which we are aware

V. The Lack of Available Forum in Any District Court Makes Clear That George Is Not Now "In Custody" Under the North Carolina Conviction.

As noted by the Ninth Circuit, this decision conflicts with that decided by the Fourth Circuit in *Word v. North Carolina, supra,* to the extent that the *Word* court held that the district of sentencing, rather than the district of confinement, is the appropriate forum in which to challenge the later sentence. However, because a prisoner who has yet to serve a sentence in another state cannot be held to be "in custody" within the meaning of section 2241(c)(3), the decision rendered by the Court in *Word* is just as erroneous as that rendered by the Ninth Circuit here. Furthermore, the decision in *Word* is contrary to the decision of this Court in *Ahrens v. Clark,* 335 U.S. 188 (1948).

Title 28, United States Code section 2241 provides, *inter alia,* that the District Court may issue a writ of habeas corpus only within its respective jurisdiction. In interpreting this section in *Ahrens v. Clark, supra,* it was held that the petitioner must be in custody within the territorial jurisdiction of the District Court, at least initially, in order for the jurisdiction of the court to attach and for relief to be

---

which show precisely how many and what kind of detainers, are filed in California or any other state each year. To obtain such figures apparently would require going through the file of each prisoner.

We can only note that the 1969 Report of the Administrative Office of the United States Courts, p. II-52 shows that:

> "The number of petitions for post-conviction relief filed by federal and state prisoners increased sharply in 1969, following the trend of the last decade. During the year 12,924 prisoners were received by the district courts—up 16 percent from the 11,152 filed in 1968 and nearly twice the number filed in 1964. All categories of prisoner cases increased, as federal prisoner petitions were up 27 percent and state prisoner petitions were up 12 percent. These cases, which comprise the largest single element in the civil caseload of the district courts, accounted for more than one-sixth of the civil filings in 1969."

granted. See also *Ex parte Endo,* 323 U.S. 283, 304-307 (1944); *Jones v. Cunningham,* 371 U.S. 236, 243-244 (1963).

In *Ahrens v. Clark,* a group of Germans was being held at Ellis Island, New York, for deportation to Germany. Their deportation had been directed under removal orders issued by the Attorney General, who was named as respondent. In affirming the dismissal of the petition this Court acknowledged that the writ must be directed to the prisoner's custodian. *Ahrens v. Clark,* supra, at 190. Nevertheless, the Court held that a district court's jurisdiction is dependent upon the physical presence of the prisoner within its territorial limits. In limiting the district courts to inquiries into the causes of restraints upon those confined or restrained within its territorial jurisdiction, the Court looked to the legislative history of section 2241. It noted that in adopting the language of section 2241, the Congress had specifically inserted the words "within their respective jurisdictions" in order to avoid the possibility that an application might be made to " 'a district judge in Florida to bring before him some men convicted and sentenced and held under imprisonment in the State of Vermont or in any of the further States.' Cong. Globe, 39th Cong., 2d Sess. 730." *Ahrens v. Clark, supra,* at 192. The Court also noted that as a practical matter, a different rule would create the expense and danger inherent in transporting a prisoner long distances.

Accordingly, in view of this decision, the Ninth Circuit and others have held that a habeas corpus petition must be brought, if at all, in the district court of confinement. *Ashley v. State of Washington,* 394 F.2d 125 (9th Cir. 1968); *Booker v. State of Arkansas,* 380 F.2d 240 (8th Cir. 1967); *United States ex rel. Van Scoten v. Pennsylvania,* 404 F.2d 767 (3rd Cir. 1968).

Only *Word v. North Carolina, supra,* is to the contrary, and in that case the Fourth Circuit held that Virginia prisoners could bring a habeas corpus action in North Carolina to challenge the sentences they were to later serve. (In reaching that decision, the Court left room in the "proper" case for suit in the district of confinement.)

The basic error of the *Word* court, of course, was in holding that the Virginia prisoners were presently entitled to federal habeas corpus relief. Since the decision in *Word* is erroneous, this action could not have been brought in North Carolina. Thus, any indication by the Ninth Circuit Court that this action might possibly be transferred to North Carolina is misleading.

Accordingly, it must be concluded that the lack of any available forum in which George might bring his action now only serves to emphasize that he is not presently "in custody" under section 2241(c)(3) and that the decision in *Peyton v. Rowe, supra,* is not applicable here. This is not to say that George has not, and will not, have a "day in court." He already has had at least two of his claims adjudicated by the North Carolina Supreme Court, and when and if he is in North Carolina custody, he may surely seek federal habeas corpus relief then. This was the result before *Peyton v. Rowe* and we think that that must be the result now.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that the decision of the Court of Appeals be reversed and the proceedings dismissed.

Dated: January 22, 1970.

THOMAS C. LYNCH
Attorney General of the State of California

ALBERT W. HARRIS, JR.
Assistant Attorney General

EDWARD P. O'BRIEN
Deputy Attorney General

LOUISE H. RENNE (MRS.)
Deputy Attorney General

Attorneys for Petitioner

(Appendix Follows)

Appendix A

UNITED STATES CODE
Title 28

§ 1254. Courts of appeals; certiorari; appeal; certified questions.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

§ 2241. Power to grant writ.

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(3) He is in custody in violation of the Constitution or laws or treaties of the United States;

§ 2243. Issuance of writ; return; hearing; decision.

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

The writ, or order to show cause shall be directed to the person having custody of the person detained.

* * * * * * *

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

§ 2254. State custody; remedies in Federal courts.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

§ 2255. Federal custody; remedies on motion attacking sentence.

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

* * * * * * *

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 4.

Process

(f) Territorial Limits of Effective Service. All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held, and, when authorized by a statute of the United States or by these rules, beyond the territorial limits of that state. In addition, persons who are brought in as parties pursuant to Rule 14, or as additional parties to a pending action or a counterclaim or cross-claim therein pursuant to Rule 19, may be served in the manner stated in paragraphs (1)—(6) of subdivision (d) of this rule at all places outside the state but within the United States that are not more than 100 miles from the place in which the action is commenced, or to which it is assigned or transferred for trial; and persons required to respond to an order of commitment for civil contempt may be served at the same places. A subpoena may be served within the territorial limits provided in Rule 45.

CALIFORNIA PENAL CODE

Chapter 8.5. Agreement on Detainers [New]

§ 1389. Disposal of detainers against prisoner based on untried charges, etc.

The agreement on detainers is hereby enacted into law and entered into by this State with all other jurisdictions legally joining therein in the form substantially as follows:

The Agreement on Detainers

The contracting states solemnly agree that:

Article 1

The party states find that charges outstanding against a prisoner, detainers based on untried indictments, informa-

tions or complaints, and difficulties in securing speedy trial of persons already incarcerated in other jurisdictions, produce uncertainties which obstruct programs of prisoner treatment and rehabilitation. Accordingly, it is the policy of the party states and the purpose of this agreement to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers based on untried indictments, informations or complaints. The party states also find that proceedings with reference to such charges and detainers, when emanating from another jurisdiction, cannot properly be had in the absence of cooperative procedures. It is the further purpose of this agreement to provide such cooperative procedures.

Article II

As used in this agreement:

(a) "State" shall mean a state of the United States; the United States of America; a territory or possession of the United States; the District of Columbia; the Commonwealth of Puerto Rico.

(b) "Sending state" shall mean a state in which a prisoner is incarcerated at the time that he initiates a request for final disposition pursuant to Article III hereof or at the time that a request for custody or availability is initiated pursuant to Article IV hereof.

(c) "Receiving state" shall mean the state in which trial is to be had on an indictment, information or complaint pursuant to Article III or Article IV hereof.

Article III

(a) Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party state, and whenever during the continuance of the term

of imprisonment there is pending in any other party state any untried indictment, information or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within one hundred eighty days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information or complaint: provided that for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance. The request of the prisoner shall be accompanied by a certificate of the appropriate official having custody of the prisoner, stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the state parole agency relating to the prisoner.

(b) The written notice and request for final disposition referred to in paragraph (a) hereof shall be given or sent by the prisoner to the warden, commissioner of corrections or other official having custody of him, who shall promptly forward it together with the certificate to the appropriate prosecuting official and court by registered or certified mail, return receipt requested.

(c) The warden, commissioner of corrections or other official having custody of the prisoner shall promptly inform him of the source and contents of any detainer lodged against him and shall also inform him of his right to make a request for final disposition of the indictment, information or complaint on which the detainer is based.

(d) Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall operate as a request for final disposition of all untried indictments, informations or complaints on the basis of which detainers have been lodged against the prisoner from the state to whose prosecuting official the request for final disposition is specifically directed. The warden, commissioner of corrections or other official having custody of the prisoner shall forthwith notify all appropriate prosecuting officers and courts in the several jurisdictions within the state to which the prisoner's request for final disposition is being sent of the proceeding being initiated by the prisoner. Any notification sent pursuant to this paragraph shall be accompanied by copies of the prisoner's written notice, request, and the certificate. If trial is not had on any indictment, information or complaint contemplated hereby prior to the return of the prisoner to the original place of imprisonment, such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

(e) Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall also be deemed to be a waiver of extradition with respect to any charge or proceeding contemplated thereby or included therein by reason of paragraph (d) hereof, and a waiver of extradition to the receiving state to serve any sentence there imposed upon him, after completion of his term of imprisonment in the sending state. The request for final disposition shall also constitute a consent by the prisoner to the production of his body in any court where his presence may be required in order to effectuate the purposes of this agreement and a further consent voluntarily to be returned to the original place of imprisonment in accordance with the provisions of

this agreement. Nothing in this paragraph shall prevent the imposition of a concurrent sentence if otherwise permitted by law.

(f) Escape from custody by the prisoner subsequent to his execution of the request for final disposition referred to in paragraph (a) hereof shall void the request.

Article IV

(a) The appropriate officer of the jurisdiction in which an untried indictment, information or complaint is pending shall be entitled to have a prisoner against whom he has lodged a detainer and who is serving a term of imprisonment in any party state made available in accordance with Article V (a) hereof upon presentation of a written request for temporary custody or availability to the appropriate authorities of the state in which the prisoner is incarcerated: provided that the court having jurisdiction of such indictment, information or complaint shall have duly approved, recorded and transmitted the request: and provided further that there shall be a period of thirty days after receipt by the appropriate authorities before the request be honored, within which period the governor of the sending state may disapprove the request for temporary custody or availability, either upon his own motion or upon motion of the prisoner.

(b) Upon receipt of the officer's written request as provided in paragraph (a) hereof, the appropriate authorities having the prisoner in custody shall furnish the officer with a certificate stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the state parole agency relating to the prisoner. Said authorities simultaneously shall

furnish all other officers and appropriate courts in the receiving state who have lodged detainers against the prisoner with similar certificates and with notices informing them of the request for custody or availability and of the reasons therefor.

(c) In respect of any proceeding made possible by this Article, trial shall be commenced within one hundred twenty days of the arrival of the prisoner in the receiving state, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.

(d) Nothing contained in this Article shall be construed to deprive any prisoner of any right which he may have to contest the legality of his delivery as provided in paragraph (a) hereof, but such delivery may not be opposed or denied on the ground that the executive authority of the sending state has not affirmatively consented to or ordered such delivery.

(e) If trial is not had on any indictment, information or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to Article V(e) hereof, such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

Article V

(a) In response to a request made under Article III or Article IV hereof, the appropriate authority in a sending state shall offer to deliver temporary custody of such prisoner to the appropriate authority in the state where such indictment, information or complaint is pending against such person in order that speedy and efficient prosecution may be had. If the request for final disposition is made

by the prisoner, the offer of temporary custody shall accompany the written notice provided for in Article III of this agreement. In the case of a federal prisoner, the appropriate authority in the receiving state shall be entitled to temporary custody as provided by this agreement or to the prisoner's presence in federal custody at the place for trial, whichever custodial arrangement may be approved by the custodian.

(b) The officer or other representative of a state accepting an offer of temporary custody shall present the following upon demand:

(1) Proper identification and evidence of his authority to act for the state into whose temporary custody the prisoner is to be given.

(2) A duly certified copy of the indictment, information or complaint on the basis of which the detainer has been lodged and on the basis of which the request for temporary custody of the prisoner has been made.

(c) If the appropriate authority shall refuse or fail to accept temporary custody of said person, or in the event that an action on the indictment, information or complaint on the basis of which the detainer has been lodged is not brought to trial within the period provided in Article III or Article IV hereof, the appropriate court of the jurisdiction where the indictment, information or complaint has been pending shall enter an order dismissing the same with prejudice, and any detainer based thereon shall cease to be of any force or effect.

(d) The temporary custody referred to in this agreement shall be only for the purpose of permitting prosecution on the charge or charges contained in one or more untried indictments, informations or complaints which form the basis of the detainer or detainers or for prosecution on any

other charge or charges arising out of the same transaction. Except for his attendance at court and while being transported to or from any place at which his presence may be required, the prisoner shall be held in a suitable jail or other facility regularly used for persons awaiting prosecution.

(e) At the earliest practicable time consonant with the purposes of this agreement, the prisoner shall be returned to the sending state.

(f) During the continuance of temporary custody or while the prisoner is otherwise being made available for trial as required by this agreement, time being served on the sentence shall continue to run but good time shall be earned by the prisoner only if, and to the extent that, the law and practice of the jurisdiction which imposed the sentence may allow.

(g) For all purposes other than that for which temporary custody as provided in this agreement is exercised, the prisoner shall be deemed to remain in the custody of and subject to the jurisdiction of the sending state and any escape from temporary custody may be dealt with in the same manner as an escape from the original place of imprisonment or in any other manner permitted by law.

(h) From the time that a party state receives custody of a prisoner pursuant to this agreement until such prisoner is returned to the territory and custody of the sending state, the state in which the one or more untried indictments, informations or complaints are pending or in which trial is being had shall be responsible for the prisoner and shall also pay all costs of transporting, caring for, keeping and returning the prisoner. The provisions of this paragraph shall govern unless the states concerned shall have entered into a supplementary agreement providing for a different

allocation of costs and responsibilities as between or among themselves. Nothing herein contained shall be construed to alter or affect any internal relationship among the departments, agencies and officers of and in the government of a party state, or between a party state and its subdivisions, as to the payment of costs, or responsibilities therefor.

Article VI

(a) In determining the duration and expiration dates of the time periods provided in Articles III and IV of this agreement, the running of said time periods shall be tolled whenever and for as long as the prisoner is unable to stand trial, as determined by the court having jurisdiction of the matter.

(b) No provision of this agreement, and no remedy made available by this agreement, shall apply to any person who is adjudged to be mentally ill.

Article VII

Each state party to this agreement shall designate an officer who, acting jointly with like officers of other party states, shall promulgate rules and regulations to carry out more effectively the terms and provisions of this agreement, and who shall provide, within and without the state, information necessary to the effective operation of this agreement.

Article VIII

This agreement shall enter into full force and effect as to a party state when such state has enacted the same into law. A state party to this agreement may withdraw herefrom by enacting a statute repealing the same. However, the withdrawal of any state shall not affect the status of any pro-

ceedings already initiated by inmates or by state officers at the time such withdrawal takes effect, nor shall it affect their rights in respect thereof.

Article IX

This agreement shall be liberally construed so as to effectuate its purposes. The provisions of this agreement shall be severable and if any phrase, clause, sentence or provision of this agreement is declared to be contrary to the constitution of any party state or of the United States or the applicability thereof to any government, agency, person or circumstance is held invalid, the validity of the remainder of this agreement and the applicability thereof to any government, agency, person or circumstance shall not be affected thereby. If this agreement shall be held contrary to the constitution of any state party hereto, the agreement shall remain in full force and effect as to the remaining states and in full force and effect as to the state affected as to all severable matters. (Added Stats. 1963, c. 2115, p. 4394, § 1.)

§ 1389.1 Appropriate court

The phrase "appropriate court" as used in the agreement on detainers shall, with reference to the courts of this State, means the court in which the indictment, information, or complaint is filed. (Added Stats. 1963, c. 2115, p. 4394, § 1).

§ 1389.2 Enforcement; co-operation

All courts, departments, agencies, officers, and employees of this State and its political subdivisions are hereby directed to enforce the agreement on detainer and to co-operate with one another and with other states in enforcing the agreement and effectuating its purpose. (Added Stats. 1963, c. 2115, p. 4394, § 1.)

§ 1389.3 Habitual criminals; application of act

Nothing in this chapter or in the agreement on detainers shall be construed to require the application of Section 644 to any person on account of any conviction had in a proceeding brought to final disposition by reason of the use of said agreement. (Added Stats. 1963, c. 2115, p. 4394, § 1.)

§ 1389.4 Escapes

Every person who has been imprisoned in a prison or institution in this State and who escapes while in the custody of an officer of this or another state in another state pursuant to the agreement on detainers is deemed to have violated Section 4530 and is punishable as provided therein. (Added Stats. 1963, c. 2115, p. 4394, § 1.)

§ 1385.5 Surrender of inmates

It shall be lawful and mandatory upon the warden or other official in charge of a penal or correctional institution in this State to give over the person of any inmate thereof whenever so required by the operation of the agreement on detainer. Such official shall inform such inmate of his rights provided in paragraph (a) of Article IV of the Agreement on Detainers in Section 1389 of this code. (Added Stats. 1963, c. 2115, p. 4394, § 1.)

§ 1389.6 Administration

The Administrator, Interstate Probation and Parole Compacts, shall administer this agreement. (Added Stats. 1963, c. 2115, p. 4394, § 1.)

§ 1389.7 Sentence concurrent with that of other jurisdiction; term-fixing and parole functions.

When, pursuant to the Agreement on Detainers, a person in actual confinement under sentence of another jurisdiction is brought before a California court and sentenced by the judge to serve a California sentence concurrently with the

sentence of the other jurisdiction, the Adult Authority and the California Women's Board of Terms and Parole, and the panels and members thereof, may meet in such other jurisdiction, or enter into cooperative arrangements with corresponding agencies in the other jurisdiction, as necessary to carry out the term-fixing and parole functions. (Added Stats. 1963, c. 2115, p. 4394, § 1, as amended Stats. 1965, c. 238, p. 1215, § 1.)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 595

LOUIS S. NELSON,
Warden, San Quentin State Prison,
Petitioner,

v.

JOHN EDWARD GEORGE,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

GEORGE A. CUMMING, JR.
111 Sutter Street, Suite 1100
San Francisco, California 94104
Telephone: (415) 434-0900
Counsel for Respondent in the Court Below

JOHN EDWARD GEORGE
Box A-83856
Represa, California 95671
Respondent, in pro se

Washington, D. C. · THIEL PRESS · 202 · 393-0625

SUBJECT INDEX

INDEX OF AUTHORITIES

CASES

CONSTITUTION AND STATUTES

OTHER AUTHORITIES

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 595

LOUIS S. NELSON,
Warden, San Quentin State Prison,
Petitioner,

v.

JOHN EDWARD GEORGE,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

In *Peyton v. Rowe*, 391 U.S. 54 (1968), this Court unanimously overruled *McNally v. Hill*, 293 U.S. 131 (1934), and held that a state prisoner serving consecutive sentences imposed by a single state is "in custody" under any one of them for purposes of habeas corpus pursuant to 28 U.S.C. § 2241(c)(3). The present case involves consecutive sentences imposed by California and North Carolina. The sole issue on

the merits is whether the Ninth Circuit was right in holding (A. 56-61) that this difference does not warrant a result contrary to that in *Peyton v. Rowe.*[1]

There is a threshold question, however, of whether or not petitioner has standing here. Respondent challenges only his North Carolina conviction. As respondent's jailer, Warden Nelson was the named respondent below. North Carolina did not seek certiorari from the decision below and has entered no appearance here. Petitioner has no personal stake in the ultimate outcome of this litigation, nor in the immediate question of whether respondent may attack his North Carolina conviction now. Petitioner's rights are not threatened and he cannot assert those of North Carolina. *Tileston v. Ullman,* 318 U.S. 44 (1943); *Heald v. District of Columbia,* 259 U.S. 114 (1922); *Yazoo & Miss. Valley R. Co. v. Jackson Vinegar Co.,* 226 U.S. 217 (1912); *cf. Flast v. Cohen,* 392 U.S. 83, 99 (1968); *Brotherhood of Railway Trainmen v. Baltimore & O. R. Co.,* 331 U.S. 519, 524 (1947). What petitioner really seeks is an advisory opinion, telling the State of California that in some future case, it need not appear and defend a consecutive sentence imposed upon a prisoner then incarcerated in another state. Respondent therefore submits that the writ of certiorari be discharged as improvidently granted. If this Court is of the view that it can reach the merits of this case, respondent submits that it should affirm.

SUMMARY OF ARGUMENT

In *Peyton v. Rowe,* this Court concluded that liberties protected by the Great Writ may well be lost if a hearing is postponed until the prisoner is actually serving the sentence which he claims is invalid. The desirability of an

---

[1]Petitioner has never claimed that the application for habeas corpus below was made to the wrong federal court, *cf. Word v. North Carolina,* 406 F.2d 352 (4 Cir. 1969). Accordingly, any objection to the decision below on this ground is waived, and we discuss the matter briefly in an Appendix, *infra.*

early hearing is equally present in this case, and petitioner's claim that a different result flows from consecutive sentences imposed by two states has been found wanting by all of the courts that have considered it.

Under the interstate Agreement on Detainers, it is clear that respondent is "in custody" on both convictions, and there is no "jurisdictional" barrier to a consideration of his claims now.

In an Appendix we consider the question, not raised by petitioner, of whether respondent's claims should be heard by the district court in California or in North Carolina, and show that the decision below was correct on this aspect as well.

ARGUMENT

IN LIGHT OF *PEYTON v. ROWE*, THE COURT OF APPEALS CORRECTLY HELD THAT RESPONDENT IS PRESENTLY ENTITLED TO CHALLENGE HIS NORTH CAROLINA CONVICTION IN A FEDERAL HABEAS CORPUS PROCEEDING COMMENCED IN CALIFORNIA.

A. Nothing in *Peyton v. Rowe* Suggests that Its Rule Is Not Equally Applicable Here.

In *Peyton v. Rowe, supra,* this Court recalled two historic functions of the Great Writ: Its primary office of post conviction relief on the basis of facts not adequately developed in the original proceedings and its vital role in securing a swift judicial review of alleged unlawful restraints upon liberty, and concluded (391 U.S. at 62-65):

> "[p]ostponement of the adjudication of such issues for years . . . lessens the probability that final disposition of the case will do substantial justice * * * Meaningful factual hearings on alleged constitutional deprivations [should] be conducted before memories and records grow stale * * * Clearly, to the extent McNally postpones plenary consideration of issues by the district courts, it undermines the character of the writ of habeas corpus as the instrument of

> resolving fact issues not adequately developed in the original proceedings * * * Common sense dictates that prisoners seeking habeas corpus relief after exhausting state remedies should be able to do so at the earliest practicable time."

Turning next to the requirement that a prisoner seeking habeas corpus be "in custody," 28 U.S.C. § 2241(c)(3), this Court concluded that the only interpretation of these words consistent with its enlightened approach to the availability of the Great Writ was one

> "which views Rowe and Thacker as being 'in custody' under the aggregate of the consecutive sentences imposed upon them. Under that interpretation they are 'in custody in violation of the Constitution' if any consecutive sentence they are scheduled to serve was imposed as the result of a deprivation of constitutional rights." 391 U.S. at 64-65.

Petitioner nevertheless argues that respondent is not "in custody"—by which he means "doing time"—on the North Carolina conviction (Pet. Br. 11-13, 23-25). But like Rowe, who "practically speaking . . . is in custody for 50 years or for the aggregate of his 30 and 20 year sentences," 391 U.S. at 64, respondent faces continual confinement for the remainder of the terms imposed by California and North Carolina. Petitioner's argument to which we have just referred has been rejected by the Fourth and Ninth Circuits, *Word v. North Carolina*, 406 F.2d 352, 355 (4 Cir. 1969), followed below (A. 59).[2] These courts concluded that in light of the interstate Agreement on Detainers, *Cal. Penal Code* §§ 1389-1389.5,[3] *North Carolina Gen. Stats.* § 148-89, prisoners such as respondent are "in custody" under both sentences, and as the facts of this case show, the courts were right.

---

[2]To the same effect: *Desmond v. United States Board of Parole*, 397 F.2d 386, 389 (1 Cir. 1968), *cert. den.* 393 U.S. 919 (under analogous Section 2255 proceedings); *United States ex rel. Van Scoten v. Pennsylvania*, 404 F.2d 767, 768 (3 Cir. 1968) (dictum).

[3]Printed at pages 3-4 of the Appendix to Petitioner's Brief.

Following respondent's incarceration at San Quentin State Prison, North Carolina filed a detainer on an untried robbery charge (A. 32). Article III(a) of the Detainer Agreement provides that a prisoner against whom a detainer is filed may request temporary release to stand trial on the underlying charge. Article III(e) provides this request is a waiver of extradition to stand trial and to serve any resulting sentence, following completion of the prisoner's sentence in the "sending state" (California). Respondent made such a request and in July, 1966, was released to North Carolina for trial. Thereafter, February 8, 1967, respondent was convicted and sentenced to a consecutive twelve to fifteen year term for armed robbery, A. 35, 56-57; *State v. George*, 271 N.C. 438, 156 S.E.2d 845 (1967). One of the grounds of respondent's attack on his conviction was the failure of North Carolina to try him within the mandatory time period set forth in Article III (A. 8-11, 16-21, 57).[4]

Shortly after respondent's return to San Quentin, North Carolina filed a conviction detainer in order that "custody can be assumed by North Carolina" (A. 34) upon the expiration of his California sentence. This will be a *pro forma* matter, for respondent has waived extradition (Article III(e), *supra*) and the California warden has a mandatory duty "to give over the person of any inmate whenever so required by the operation of the agreement on detainers," *Cal. Penal Code* § 1385.5. In light of the provisions of this interstate compact, the Fourth Circuit correctly held, *Word v. North Carolina, supra*, 406 F.2d at 359:

> "The Virginia warden's authority to detain each of the prisoners is clearly dual. When the authorization of the Virginia commitment is terminated by full sentence or by pardon or parole, the Virginia Warden will continue to detain the prisoner under the authorization of the detainer. The prisoner

[4]The others are an alleged denial of his constitutional right to a speedy trial and the prosecution's use of testimony known to be perjurious (A. 22, 57).

> has no hope of release until both authorizations are ended, for if either is withdrawn or expires, the warden will continue to hold him under the other."

Petitioner would distinguish *Peyton v. Rowe* from this case on the sole ground of a statement in that opinion that (p. 65)

> "at least one class of prisoners will have the opportunity to challenge defective convictions and obtain relief without having to spend unwarranted months or years in prison."

from which he deduces a limitation of that rule to a "class" of prisoners serving consecutive sentences imposed by a single state (Pet. Br. 12-13). Nothing in *Peyton* suggests that this Court attached any significance to consecutive sentences imposed by one state when it concluded (p. 67)

> "We overruled McNally v. Hill and hold that a prisoner serving consecutive sentences is 'in custody' under any one of them for purposes of § 2241(c)(3)."

Petitioner's strained construction of the reference to one class of prisoners ignores its plain meaning. This Court was at pains to point out the inherent delays in the processing of criminal cases and the consequence that prisoners attacking current sentences must unavoidably serve time that "they might properly have enjoyed as free men," 391 U.S. at 64. The distinction drawn was between these prisoners and those who may now challenge a second sentence while properly incarcerated on the first.

B. Answer to Miscellaneous Arguments of Petitioner

Petitioner's assertion that he is not the proper party respondent (Br. 13-16) and that the district court lacks jurisdiction over the State of North Carolina (Br. 17-18) is simply a restatement of the claim that respondent is not in custody under the North Carolina conviction and detainer.[5]

---

[5]On the facts of this case, the claim that North Carolina is an absentee party over whom the court has no jurisdiction seems very doubtful. See generally, *McGee v. International Life Ins. Co.*, 335

Since the court, for the reasons shown above, correctly held that respondent is in custody for purposes of habeas corpus under 28 U.S.C. § 2241(c)(3), only a brief reply is required. The district court unquestionably has the power to order respondent's release at the end of his current sentence and to prevent any California official from participating in a scheme to return him to North Carolina. Nothing more is required. Warden Nelson has no obligation to defend the North Carolina conviction, and if North Carolina wishes to avoid this result, it can appear and do so itself.

Equally without merit is the attempt to avoid a meaningful inquiry into respondent's constitutional claims on the basis of an analogy to interstate rendition cases, *e.g.*, *Sweeney v. Woodall*, 344 U.S. 86 (1952) (Pet. Br. 19-21). "Extradition habeas corpus" has long been recognized as a distinctly different proceeding,[6] governed by separate constitutional and statutory provisions, *e.g.*, U.S. Const. Art. 4 § 2, 18 U.S.C. § 3182. As petitioner's authority shows, the permissible scope of inquiry is quite unlike that involving the Great Writ, *Smith v. State of Idaho*, 373 F.2d 149 (9 Cir.), *cert. den.* 388 U.S. 919 (1967), and the facts of *Sweeney v. Woodall, supra*, demonstrate its inapplicability to the case at bar. The petitioner was an escaped felon, recaptured in Ohio, who resisted extradition on the ground of alleged mistreatment by Alabama prison officials. Thus his claim to an audience before the federal court in the district of his capture was (a) a wholly illegitimate attempt to obtain greater rights by escape than he had before (344 U.S. at 89-90), (b) made without the necessary exhaustion of state remedies (*ibid.*) and (c) an attempt to litigate a claim—the propriety of custodial treatment—that petitioner asserts is not

---

U.S. 220 (1957); *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945).

[6]See Note, *Extradition Habeas Corpus*, 74 YALE L.J. 87 (1964); Comment, *The Limits of Constitutional Inquiry on Habeas Corpus in Interstate Rendition*, 21 U. CHI. L. REV. 735 (1954); Note, *The Scope of Habeas Corpus Hearing on Interstate Extradition of Criminals*, 53 YALE L.J. 359 (1944).

cognizable in habeas corpus (Pet. Br. 16). The present case involves the converse of these propositions and *Sweeney v. Woodall* is not in point.

Finally, petitioner urges that the Great Writ be denied here because of alleged "practical difficulties" in its administration (Pet. Br. 21-22).[7] This is simply an attempt to put a price tag on respondent's constitutional rights, *Smith v. Hooey*, 393 U.S. 374, 380 n. 11 (1969). Similar problems have arisen in the past, and Congress has reacted not by abolishing the writ but by redistributing the business of administering it, 28 U.S.C. §§ 2241(d), 2255. It can certainly do so again.

CONCLUSION.

Respondent respectfully submits that the decision below was correct and that this Court should affirm.

Dated: February 21, 1970.

JOHN EDWARD GEORGE

Respondent, in pro se

GEORGE A. CUMMING, JR.

*Counsel for the Respondent in the Court Below**

---

[7]This seems inconsistent with petitioner's claim that the result in *Word v. North Carolina, supra,* is also incorrect (e.g., Pet. Br. 11, 23, 25), for most of the difficulties seen by petitioner would vanish if that case were followed.

*At the time this brief was sent to the printer, respondent was unrepresented by counsel in this Court and an application for the appointment of counsel was pending. The brief was submitted on behalf of respondent by the attorney above named, who served as co-counsel of record in the Court below (see A. 2).

APPENDIX

THE "VENUE" QUESTION

The court below held that the district court in California where respondent is presently confined, is the proper court to hear his claims. The Fourth Circuit has held that a hearing in the district of confinement, where permissible, is infrequently preferable to one held in the district of sentencing, *Word v. North Carolina, supra,* 406 F.2d at 355-61. Although calling attention to this conflict (*e.g.*, Pet. Cert. 7, 9), petitioner has never urged that respondent applied for relief to the wrong district court. Thus while we regard the matter as waived, we briefly address ourselves to it in this Appendix in the event this Court wishes to resolve the conflict now.

The Ninth Circuit believed that the matter was controlled by *Ahrens v. Clark,* 335 U.S. 188 (1948), where this Court held that a prisoner must seek habeas corpus in the district of his confinement. Speaking for the Fourth Circuit, Chief Judge Haynsworth regarded *Ahrens* as being largely the product of congressional disapproval of a Vermont judge inquiring into the circumstances of a Florida prisoner serving a Florida sentence, and concluded that the rationale of *Ahrens* did not require the same result in cases such as the one at bar. We respectfully disagree with Judge Haynsworth's conclusion, for while the rationale of *Ahrens* might not require that a hearing be held in the district of confinement, it does not necessarily follow that such a hearing would be improper.

The *Word* decision is at odds with another aspect of *Ahrens,* congressional disapproval of the transportation of prisoners to attend hearings far distant from their place of incarceration. Judge Haynsworth thought there was an appropriate analogy to proceedings under 28 U.S.C. § 2255, but it seems to us that the movement of federal prisoners within the federal prison system is much less complicated than that, as here, which would require the efforts of the

officials of two states and the United States Marshal's office. In addition to creating problems of transportation and custody, the *Word* result seems unwise as a matter of sound judicial administration. It may very well lead prisoners otherwise content with consecutive sentences to challenge them in the hope of obtaining nothing more than a free trip across the country.

Moreover, the decision in *Word* rests largely on the convenience to officials of the jurisdiction whose judgment is challenged, but the requirement that a prisoner litigate his case in a distant forum may well be a sacrifice of his right to a fair consideration of his claims. The district court must make an initial determination as to the merits of an often inartfully drawn petition for habeas corpus. In close cases and with the prisoner nearby, the court may order an evidentiary hearing to resolve any lingering doubts. But where this would require summoning the prisoner from across the country, such doubts might well be resolved against him.

Word also raises problems of adequate legal representation. There is now no provision for the compensation or deferral of expenses of appointed counsel in indigent habeas corpus cases, and the courts therefore depend upon the voluntary assistance of local members of the bar. The result in *Word* would seem to require the transfer of a prisoner weeks, and perhaps months, in advance of an evidentiary hearing, in order to permit him to confer and develop his case with local counsel. Alternatively, it might be preferable to provide funds for California counsel to accompany the prisoner to the hearing or for North Carolina counsel to visit the prisoner beforehand.

These are but a few of the problems created by *Word;* the contrary decision of the court below will probably create others, and the possible solutions are numerous. *Ahrens v. Clark* ultimately rested on the belief that the task of distributing judicial business among the several district courts is a job for Congress. In the context of the present

case, this is not simply a matter of tradition, but rather, we submit, a recognition that the legislature is better able to canvass all of the potential problems and to adopt solutions to as many of them as possible. Respondent therefore urges that *Ahrens v. Clark* be followed here, and the decision below be affirmed on all grounds.

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

In the Supreme Court of the United States

OCTOBER TERM, 1969

NO. 595

LOUIS S. NELSON, Warden,
SAN QUENTIN PRISON,
Petitioner,

vs.

JOHN EDWARD GEORGE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

ARGUMENT

I. The Writ of Certiorari Was Not Improvidently Granted.

In his brief Respondent states (pp. 1-2) that the petitioner "has no personal stake in the ultimate outcome of this litigation," and, for that reason, the writ was improvidently granted. However, while we may agree that petitioner has no interest in defending a North Carolina conviction, that is a fact which only serves to emphasize the erroneous nature of the decision below and not that the writ was improvidently granted.

The Court below has held that petitioner is the proper party respondent to defend the North Carolina conviction. Since California officials accordingly must appear in court and take whatever appropriate action is necessary, petitioner's interest in maintaining this action is clear. This writ, therefore, ought not to be dismissed as having been improvidently granted.

II. It Has Not Been Claimed That Respondent George Filed His Petition in the Wrong Court Because the Holding in Peyton v. Rowe, 391 U.S. 54 (1968), Should Not be Extended to This Case, and, in Any Event, Under Prevailing Case Law There Would Be No Other Forum Available Now to Resolve Respondent's Claims.

The respondent George correctly states that we have not claimed that his petition for writ of habeas corpus was filed in the wrong court (Respondent's Brief, page 2, n.1, App. 1-3). Thus, we have not urged that George should have filed his petition in North Carolina (the district of sentencing) as *Word* v. *State of North Carolina*, 406 F.2d 352 (4th Cir. 1969), would permit rather than in California (the district of confinement) as the Ninth Circuit in the decision below has required.

We have not urged this view first, because the holding in *Peyton* v. *Rowe*, 391 U.S. 54 (1968), should not be extended to apply to this case, and, second, because this Court's decision in *Ahrens* v. *Clark*, 335 U.S. 188 (1948), has been interpreted by the majority of lower courts as holding that a petition for writ of habeas corpus must be filed, if at all, in the district of confinement. The Third Circuit's decision in *United States ex rel. Van Scoten* v. *Pennsylvania*, 404 F.2d 767 (3rd Cir. 1968), and the authority cited there is to this effect. Similarly, the Ninth Circuit in *Ashley* v. *State of Washington*, 394 F.2d 125 (9th

Cir. 1968), previously had held that a Florida prisoner could not seek habeas corpus relief in a district court located in the State of Washington to challenge a Washington detainer.

Word v. *State of North Carolina, supra,* holds to the contrary, but it is fortuitous that both this case and *Word* should involve unserved sentences imposed by the State of North Carolina. Accordingly, until this Court holds that the lower courts have misconstrued the application of *Ahrens* v. *Clark* this petition could not have been filed in most other district courts.

In any event, it has consistently been our position that the court below erred in deciding each of the questions presented by this case. It erroneously extended the holding in *Peyton* v. *Rowe, supra,* to permit George to attack his North Carolina sentence now, and it erroneously decided that the California warden was the appropriate party respondent to defend that conviction in a California district court. Even if this court were now to hold, as respondent urges, that George may now challenge his North Carolina sentence, it would still be our view that the California warden is not a proper party respondent and that the court below incorrectly decided the forum question. Indeed, if this Court should agree that George may challenge his North Carolina sentence now, then it should also decide that the appropriate forum in which to bring this action is in the district of sentencing. As we shall discuss more fully *infra* (10-11, 13-14), that result would be more consistent with the legislative intent that has been expressed to date. However, it is our basic position that respondent is not "in custody" under the North Carolina judgment and that it is not desirable to extend the holding in *Peyton* v. *Rowe, supra,* to a case of this kind. It is our view that an extension of

Peyton v. *Rowe, supra,* is not required by the Constitution which states only that the "writ of habeas corpus shall not be suspended . . ., (Art. I, sec. 9(2); nor by 28 U.S.C. 2241(c)(3) (1964), which implements the constitutional command by providing that [t]he writ . . . shall not extend to a prisoner unless . . . [h]e is in custody . . ."; nor by the holding in *Peyton* v. *Rowe, supra,* itself. We reply to these points.

III. Respondent George Is Not "In Custody" Under the North Carolina Sentence.

Respondent George is not "in custody" under the North Carolina sentence. Thus, we do not take the view as respondent George apparently does (Respondent's Brief, pp. 4-5) that because California permitted him to stand trial in North Carolina under the Agreement on Detainers, he is now "in custody" under the North Carolina judgment within the meaning of 28 United States Code § 2241, *et seq.* George is no more in custody now under the North Carolina judgment than he was before he was tried and convicted there, or, if the North Carolina sentence had been imposed at a time when he was an escapee or a parolee from California custody. Similarly, he is no more in custody now under the North Carolina sentence than if North Carolina were not a party to the Agreement on Detainers and temporary custody had been sought and obtained by executive agreement followed by extradition. The sentence now being served is that of California and the North Carolina sentence is not a cause for an additional or increased period of confinement.

The various theories employed to establish a finding of custody do not establish that fact. Thus, in holding habeas corpus relief to be presently available, the Court below

adopted an "agency" theory, stating that the California warden was an "agent of the North Carolina warden, as evidenced by the detainer" (A. 60). However, the California warden has not assumed any further custodial obligations because of the North Carolina sentence. He is restraining George solely because of the California conviction and is not an "agent" for North Carolina. A brief comparison with some other types of agreements should also serve to put that theory to rest. Thus, for example, under the Western Interstate Corrections Compact to which California is a party state (Cal. Pen Code § 11190, et seq.), California, when designated as a receiving state, accepts custody of persons convicted in other states, even though a California conviction is not involved. Similar agreements sometimes are reached with respect to federal prisoners and individually with states not parties to the Western Interstate Corrections Compact. In those cases, it may be noted, it is the contractual practice for the sending party to agree to defend legal proceedings involving the prisoner.

Desmond v. *United States Board of Parole*, 397 F.2d 386 (1st Cir. 1968), *cert. denied* 393 U.S. 919 (1968), is also cited by the respondent (Brief, p. 4). There, a state prisoner was permitted to file a motion to vacate a federal sentence under 28 U.S.C. § 2255. That section requires the moving party to be "in custody" under a federal sentence.[1]

---

1. 28 U.S.C. § 2255 provides in pertinent part that:

"A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence."

In *Desmond*, the factual circumstances were that a state prisoner was to resume service upon the federal sentence from which he previously had been paroled. However, in holding the principles of *Peyton* v. *Rowe*, *supra*, to be applicable to the case of resumed incarceration, the court, in *Desmond*, did not directly address itself to the question of custody. Indeed, what it did say points to a different conclusion. Thus, the Court stated, inter alia, that:

> "In Peyton v. Rowe, 391 U.S. 54, 88 S.Ct. 1549, 20 L.Ed.2d 426 (5/20/68), the Court held that a defendant while serving the first of two consecutive sentences could attack the second. It does not seem to us a significant stretch to say that he may attack a federal sentence, yet to be served, while defendant is in custody completing a state sentence. The same principles which dictated Peyton v. Rowe seem to us to support jurisdiction here. To be sure, defendant is not physically 'in custody under sentence of a court established by Act of Congress', but if custody is to be construed as single and continuous, we may join the courts as well." 397 F.2d at 389.

However, in an effort to join "the courts as well" the court did not discuss the particular problems which might be involved in the interstate case.

The respondent George also points to the decision in *Word* wherein reference is made to the effect which a detainer might have upon a parole or as a factor in precluding a lower level of custody. He also quotes that portion of the *Word* court's decision to the effect that the detainer constitutes a cause for a dual commitment at the termination of present custody. (Respondent's Brief, pp. 5-6).

However, for a number of reasons the effect, if any, of a detainer cannot be said to establish "custody" in order

to challenge the North Carolina sentence. Thus, the effect, if any, which one jurisdiction may give to the filing of a detainer by another, is a matter of comity and policy which rests solely within the discretion of the confining jurisdiction. As a result, the effect of any detainer may vary from state to state.

Thus, whatever the showing in *Word*, it appears that the effect of any detainer upon the parole decision varies from state to state.[2] In California, a detainer based upon an unserved sentence might result in an earlier release date than would otherwise be the case (A. 37).

Similarly, while the detainer in *Word* apparently precluded a lower level of custody, a detainer in California is only one of several factors considered in determining eligibility for minimum custody. Moreover, even in those cases where a detainer is considered a potential bar, it may be that for other reasons the nature of the inmate's confinement is unaffected by the detainer.

In this connection this Court's decision in *Wales* v. *Whitney*, 114 U.S. 564 (1885) is pertinent. There, court-martial charges were preferred against a naval medical officer who was stationed in Washington, D. C. The Secretary of the Navy placed the officer under arrest and ordered him to remain within the limits of the city until his trial should take place. This Court held that habeas corpus was not available to him, stating that:

> ". . . as Medical Director, he was residing in Washington and performing there the duties of his office. It is beyond dispute that the Secretary of the Navy

2. *Sentencing*, The Decision As To Type, Length, and Conditions of Sentence, by Robert O. Dawson (The Report of the American Bar Foundation's Survey of the Administration of Criminal Justice in the United States), (1969) pages 283-287.

had the right to direct him to reside in the city in performance of these duties. If he had been somewhere else the Secretary could have ordered him to Washington as Medical Director, and, in order to leave Washington lawfully, he would have to obtain leave of absence. He must, in such case, remain here until otherwise ordered or permitted. It is not easy to see how he is under any restraint of his personal liberty by the order of arrest, which he was not under before." 114 U.S. at 569-570.

Furthermore, were the Court to hold that the mere possibility of increased restraint constituted custody, it is difficult to see why this rationale would not extend to a prisoner who is serving an admittedly valid sentence, but who seeks to attack an earlier conviction which resulted in a sentence that he has already served.

The present effect of a detainer upon confinement, of course, presents a new theory of custody, for this Court in *Peyton* v. *Rowe, supra,* was concerned only with the effect of the future sentence upon the duration of the prisoner's confinement. However, in our view, this theory is not relevant in determining whether there is "custody" under the North Carolina sentence challenged. Indeed, we do not believe that respondent's interest in challenging his North Carolina conviction now would be any less if North Carolina were to remove their detainer tomorrow. The validity of any detainer system may raise legal questions, and any prisoner might wish to challenge the level of custody at which he is kept. But as yet, there is no constitutional right to one level of custody over another, or a constitutional right to be free of a detainer. Thus, any questions raised with regard to a detainer upon confinement pertain solely to the internal management of a prison system and not custody, and, at the very least, should be addressed to the state courts in the first instance.

Similarly, the dual commitment theory advanced by the Court in *Word* cannot be said to establish "custody." As even those commentators seeking to extend the holding in *Peyton* v. *Rowe, supra*, recognize, this is a "legal fiction" which is contrary to fact.[2] Furthermore, this theory ignores the fact that if North Carolina were not a party to the Interstate Agreement on Detainers (or if George were not a prisoner), custody of George would have to be obtained by way of extradition. As respondent recognizes, in extradition habeas corpus, review is limited (Brief, p.7). This theory, however, permits a kind of review in the case of a detainer which is precluded in the case of extradition. *Sweeney* v. *Woodall*, 344 U.S. 86 (1952).

In reviewing these various theories of custody, therefore, it seems clear the courts below have attempted unduly to stretch the concept of custody in an effort to implement the underlying policy reason for the decision in *Peyton* v. *Rowe, supra*. That policy is that it is desirable to litigate constitutional claims as early as possible.

However, while that policy is a desirable one, it does not establish "custody." Furthermore, there is a point at which it is not desirable to permit that one policy to override all others. That point has been reached in this case.

Thus, as we noted in our opening brief, it may be the case that the respondent George will never serve his North Carolina sentence. In such a case an extension of *Peyton* v. *Rowe, supra*, would result in an unnecessary utilization of judicial resources. While that result can be justified in the intrastate case where, for all practical purposes (in-

---

2. See, the comment, "The Custody Requirement and Territorial Jurisdiction in Federal Habeas Corpus: *Word* v. *North Carolina*," 118 University of Pennsylvania 629, 635-636 (1970).

cluding parole eligibility), sentences are treated as one, that same justification may not be given in the case where convictions are imposed by separate jurisdictions.

Furthermore, in order to decide a case of this kind, it cannot be ignored that the costs incurred will frequently be considerable, regardless of the forum chosen. This, of course, would be particularly true if an evidentiary hearing is held at which the prisoner's presence is required. In stating this as a fact to be considered, we are not attempting to put a "price tag" on constitutional rights, as respondent George asserts (Brief, p.8). We are only stating that in an attempt to mark the boundaries of habeas corpus relief, whoever is required to pay those expenses—whether the state or federal government—could reasonably question whether such expenses are justified when the prisoner is located in another jurisdiction serving a sentence for another crime committed there.

In any event, should the holding in *Peyton* v. *Rowe*, *supra*, be extended, the practical problems inherent in determining an appropriate choice of forum also must be considered. These problems, too, militate against extending *Peyton* v. *Rowe*, *supra*. In this connection, it should be made clear that the choice made by the Ninth Circuit in the decision below was totally wrong. Thus, as we pointed out in our opening brief, the obligation imposed upon the California officials to defend this action is unrealistic for they have no interest in defending the conviction and no assurance that an appropriate North Carolina official will appear in cooperation with their efforts. The proper party respondent must be an appropriate party respondent.

Furthermore, the decision reached by the Ninth Circuit presents a solution which Congress earlier rejected when it enacted Title 28, United States Code section 2255. There,

in providing a remedy in the sentencing court rather than in the district of confinement, Congress rejected a solution which would require federal records, counsel, and when necessary, witnesses to be transported across the country. *United States* v. *Hayman*, 342 U.S. 205 (1952). A similar rejection was implicit in the enactment of Title 28, United States Code section 2241(d) dealing with petitions filed in those states having more than one district court.

Neither fairness to the state (whether California or North Carolina) nor fairness to the respondent George is achieved by hearing his claims in California. Both parties must necessarily depend upon records and witnesses located across the country in North Carolina. Furthermore, while reasons of comity or other available remedies might insure the presence of state witnesses or prisoners (*cf.* *Barber* v. *Page*, 390 U.S. 719 (1968), the availability of other witnesses is not at all clear. For example, the Uniform Act to Secure the Attendance of Witnesses From Without a State in Criminal Proceedings, by its terms, appears limited to criminal proceedings. Cal. Pen. Code § 1334 et seq. *Cf.* Rule 4(f) and Rule 45 of the Federal Rules of Civil Procedure.

Even if the claims raised by this petition could be resolved "upon the papers" the result reached in the decision below is untenable. Assuming, *arguendo*, the ready availability of North Carolina records to aid the court, or even the availability of North Carolina counsel, a California judge may not be familiar with the criminal procedure of another state or the possibile ramifications that that procedure might have in deciding matters of constitutional rights. If California counsel were chosen to aid the petitioner, by definition he is removed from the "scene of the facts" and unfamiliar with North Carolina procedures. While we recognize that it is a resolution of

constitutional rights with which we are here concerned, resolution of these rights may frequently turn on the procedural framework in which they are raised. Often as simple a matter as locating records depends upon a first-hand knowledge of courts and personnel.

The decision below also represents most realistically the worst fears of Congress which it expressed in 1867 when it adopted the language of Title 28, United States Code section 2241 limiting the issuance of the writ to the territorial confines of the district court. As set forth in *Ahrens* v. *Clark*, *supra*, the Congress adopted this limitation because it feared that a judge in Florida might call up before him a prisoner convicted and sentenced in Vermont. This was one reason for the court's decision in *Ahrens* v. *Clark*, *supra*, yet this is precisely the effect which the decision below has since it means that a California judge will now call before him men tried and convicted in other states.

On the other hand, while this effect is not presented by the decision in *Word* to the extent it permits the filing of the petition in the district of sentencing, that decision also presents difficulties as respondent himself admits (Brief, App. 1-3). These difficulties, which constituted a second basis for the decision in *Ahrens* v. *Clark*, *supra*, cannot be minimized. Thus, as the court stated in *Ahrens* v. Clark,

> "It would take compelling reasons to conclude that Congress contemplated the production of prisoners from remote sections, perhaps thousands of miles from the District Court that issued the writ. The opportunities for escape afforded by travel, the cost of transportation, the administrative burden of such an undertaking negate such a purpose. These are matters of policy which counsel us to construe the jurisdictional

provision of the statute in the conventional sense, even though in some situations return of the prisoner to the court where he was tried and convicted might seem to offer some advantages." 335 U.S. at 191.

Accordingly, while it cannot be said that the decision in *Word* is a realization of the fears of Congress that a Florida judge would review a Vermont conviction, it does present the same practical problems outlined in *Ahrens* v. *Clark*, *supra*. These are practical problems which are inherent in compelling a choice of forum,[4] and militate against an extension of *Peyton* v. *Rowe*.

IV. Any Extension of the Holding in Peyton v. Rowe, Supra, Ought to Await Congressional Action or Interstate Agreement. If Not, Then the District of Sentencing Is the Appropriate Forum in Which to Bring an Action of This Kind.

For the reasons stated above, the holding in *Peyton* v. *Rowe*, *supra*, ought not to be extended to provide for habeas corpus relief in the multi-state case. That course is not a desirable one, at least until the Congress has given specific approval. While it might be desirable to provide some form of post-conviction relief in order to permit a prisoner to challenge an unserved sentence imposed by another state, the kind of relief provided should be enacted by the Congress, or by the states through an interstate compact similar to the Agreement on Detainers. *Cf.* ABA Standards

4. In reaching its decision the court in *Word* relied upon a number of cases in which habeas corpus relief was sought in this country by petitioners located outside the United States. We refer, for example, to *Hirota* v. *MacArthur*, 338 U.S. 197, 202 (1948); *Toth* v. *Quarles*, 350 U.S. 11, 13 (1955); *Burns* v. *Wilson*, 346 U.S. 137 (1953); and *Day* v. *Wilson*, 247 F.2d 60 (D.C. Cir. 1957). However, we do not believe that these decisions are relevant, or even exceptions to the holding in *Ahrens* v. *Clark*. Those cases do not deal with a choice of forum as did *Ahrens* v. *Clark*, nor with a possible delay in remedy which is involved here. Rather, those cases deal with the problem which is presented when there might not be any habeas corpus relief available at any time.

Relating to Post-Conviction Remedies (Approved Draft, 1968) Commentary to § 23, pages 44-45.

However, should this Court decide that habeas corpus relief must be made available now to prisoners waiting to serve future sentences in another state, then the district of sentencing is the appropriate forum in which to determine the merits of the claims made. To that extent the decision in *Word* is correct. Resolution of claims in the district of sentencing is more consistent with Congressional policy enunciated to date, while the decision below has been rejected by the Congress whenever considered (see, *supra,* 10-11).

It is true, of course, that Congress has not yet found it necessary to consider in what forum, if any, relief should be sought in a case of this kind. This is because it has been the view until recently that habeas corpus relief is not available to prisoners located in one state seeking to challenge an unserved sentence imposed by another. However, should the Court now decide that there is such a right, the remedy provided should at least be consistent with that Congressional policy which has been expressed to date in analogous situations. That policy is that, where post-conviction relief must be made available, the appropriate forum lies in the district of sentencing. The alternative permitted by *Word* that the district of confinement may be "infrequently preferable" (*Word* v. *North Carolina*, *supra* at 355), raises the same problems as the decision below. In addition, it provides a potential for forum shopping. For these reasons, too, this alternative should be rejected.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the decision of the Court of Appeal be reversed.

DATED: March 20, 1970

THOMAS C. LYNCH
Attorney General of the State of California

ALBERT W. HARRIS, JR.
Assistant Attorney General

LOUISE H. RENNE (MRS.)
Deputy Attorney General

Attorneys for Petitioner